Supreme Court, U. S.
FILED
MAY 15 1979
ROBAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1722

DRIANNE BENNER, JEFFREY GLAZIER, JAMES SCARANTINO, ANNE ZIMINSKI AND CHARLES J. ZITO,

Petitioners,

v.

JOHN W. OSWALD, MILTON J. SHAPP, KENT SHELHAMMER, CARYL KLINE, MAURICE K. GODDARD, HARRY BOYER, HELEN DAVIES, JOSEPH RHODES, JR., ROBERT L. RUTTENBERG, DION C. STEWART, WILLIAM K. ULERICH, H. JESSE ARNELLE, MARIAN U. BARASH, WALTER J. CONTI, BARBARA H. FRANKLIN, RALPH HETZEL, KENNETH L. HOLDERMAN, CHARLES W. SHAEFFER, HELEN WISE, J. LIN HUBER, JOHN M. PHILLIPS, JOHN R. PITZER, JR., LUTHER SNYDER, HARRY R. ULRICH, J. LEWIS WILLIAMS, H. THOMAS HALLOWELL, JR., SAMUEL F. HINKLE, JOHN L. ROMIG, STANLEY G. SCHAFFER, G. ALBERT SHOEMAKER, AND QUENTIN E. WOOD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALAN B. MORRISON
DIANE B. COHN
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Petitioners

THOMAS B. SCHMIDT, III
10 South Market Square
P.O. Box 1181
Harrisburg, Pennsylvania 17109
(717) 233-8483
Of Counsel

THE CASILLAS PRESS, INC. - 1717 K Street N. W. - Washington, D. C. - 223-1220

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
The Decision of the Third Circuit is Inconsistent With Decisions of This Court and Conflicts with Decisions of Other Circuits	10
CONCLUSION	14
APPENDIX A	
District Court Opinion	A-1
District Court Order	A-40
Judgment	A-41
APPENDIX B	
Court of Appeals Opinion	B-1
Judgment	B-20
APPENDIX C	
Sur Petition for Panel Rehearing	C-1
APPENDIX D	
Court of Appeals Order Adding a Plaintiff	D-1
APPENDIX E	
Court of Appeals Order Recalling and Amending the Judgment	E-1

TABLE OF AUTHORITIES

Cases: Page

Ambach v. Norwick,
__ U.S. ___, 47 U.S.L.W. 4387 (April 17, 1979) . . . 12

Baker v. Regional High School District No. 5,
520 F.2d 799 (2d Cir. 1975), *cert. denied*,
sub nom. Nonnewaug Regional School District
v. Scott, 424 U.S. 965 (1976) 12

Braden v. University of Pittsburgh,
552 F.2d 948 (3d Cir. 1977) (*en banc*) 7

Burton v. Wilmington Parking Authority,
365 U.S. 715 (1961) 7

Dundee v. Orleans Board of Parish Supervisors,
434 F.2d 135 (5th Cir. 1970) 12

Fireman v. Chicago R.I. & P.R. Co.,
393 U.S. 129 (1968) 11

Gibson v. Berryhill,
411 U.S. 564 (1974) 12

Hadley v. Junior College District of Kansas City,
397 U.S. 50 (1970) 9

Holt Civic Club Inc. v. City of Tuscaloosa,
___ U.S. ___, 99 S.Ct. 383, 47 U.S.L.W. 4008
(1978) 9, 12

Illinois State Board of Elections v. Socialist
Workers Party, ___ U.S. ___, 99 S.Ct. 983,
47 U.S.L.W. 4197 (1979) 13

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 7

Page

Kramer v. Union Free School District,
395 U.S. 621 (1969) 2, 7, 8, 9, 11, 12

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976) 9

Salyer Land Co. v. Tulare Lake Basin Water
Storage Dist., 410 U.S. 719 (1973) 12, 14

Sosna v. Iowa,
419 U.S. 393 (1975) 6

Vance v. Bradley,
___ U.S. ___, 99 S.Ct. 939, 47 U.S.L.W. 4176
(1979) 11, 12, 13

Constitutional Provisions:

Fourteenth Amendment, Section 1 . . . . . 3, 6

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(1) 7

42 U.S.C. § 1983 6

Act of February 22, 1855, P.L. 46,
§ 3, 24 P.S. § 2533 3
§ 5, 24 P.S. § 2535 3
§ 7, 24 P.S. § 2542 3

Morrill Act of 1862, 12 Stat. 503, 7 U.S.C. §§ 301 *et seq.* . . 4

Page

Other Authorities:

Fed. R. Civ. P. 23(b)(2) 6

In The

Supreme Court of the United States

October Term, 1978

No.

DRIANNE BENNER, JEFFREY GLAZIER, JAMES SCARANTINO, ANNE ZIMINSKI AND CHARLES J. ZITO,

Petitioners,

v.

JOHN W. OSWALD, MILTON J. SHAPP, KENT SHELHAMMER, CARYL KLINE, MAURICE K. GODDARD, HARRY BOYER, HELEN DAVIES, JOSEPH RHODES, JR., ROBERT L. RUTTENBERG, DION C. STEWART, WILLIAM K. ULERICH, H. JESSE ARNELLE, MARIAN U. BARASH, WALTER J. CONTI, BARBARA H. FRANKLIN, RALPH HETZEL, KENNETH L. HOLDERMAN, CHARLES W. SHAEFFER, HELEN WISE, J. LIN HUBER, JOHN M. PHILLIPS, JOHN R. PITZER, JR., LUTHER SNYDER, HARRY R. ULRICH, J. LEWIS WILLIAMS, H. THOMAS HALLOWELL, JR., SAMUEL F. HINKLE, JOHN L. ROMIG, STANLEY G. SCHAFFER, G. ALBERT SHOEMAKER, AND QUENTIN E. WOOD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Twenty-one of the thirty-two trustees of Pennsylvania State University are elected by the University's alumni and by members of the private agricultural and industrial societies in Pennsylvania. This action challenges the constitutionality of this process which denies to nearly 50,000 students at Penn State the right to vote for those trustees, whose decisions vitally affect their lives. Recognizing that

there is no independent right to vote in these circumstances, petitioners, relying on *Kramer v. Union Free School District*, 395 U.S. 621 (1969), seek only the equal protection of the laws. If those with the franchise continue to vote, then petitioners and other students cannot be excluded; only if those who now vote no longer vote, can students be excluded, in which case the remaining eleven trustees, who are either appointed by the Governor or serve by reason of their official positions, will manage the affairs of the University.

OPINIONS BELOW

The opinion of the district court is officially reported at 444 F.Supp. 545 (M.D. Pa. 1978) and is set forth at Appendix A, *infra*, pp. 1-39. The opinion of the court of appeals (Appendix B, pp. 1-20) is officially reported at 592 F.2d 174 (3d Cir. 1979). The order denying rehearing is not officially reported, and is set forth in Appendix C (pp. 1-2).

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979, and the order denying rehearing was entered on February 15, 1979. On March 6, 1979, the court entered an order granting the motion of petitioners to add a party plaintiff *nunc pro tunc* (Appendix D, pp. 1-2) and issued another order on the same date recalling the mandate and amending the judgment (Appendix E, pp. 1-2). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Is it constitutional to exclude students of a state university from participating in elections for its trustees where the decision to exclude is not made by the legislature but by the interested trustees themselves and where the exclusion is based on the University's early history rather than on any affirmative state policy?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of Facts.

Penn State University was created by statute in 1855 and was initially known as the Farmers' High School of Pennsylvania. The enabling act provided great detail about the purposes of the school and the subjects to be taught, principally those that ". . . will conduce to the proper education of a farmer." Act of February 22, 1855, P.L. 46, § 7, 24 P.S. § 2542. The statute also set the number of trustees at thirteen. It specified that the Governor, the Secretary of the Commonwealth, the "principal of the institution," and the President of the state agricultural society shall be *ex officio* members of the board, and it designated the other nine trustees by name. *Id.*, § 3, 24 P.S. § 2533. It further provided that the successors to the nine non *ex officio* trustees shall be elected annually by delegates of each county agricultural society in the Commonwealth. *Id.* § 5, 24 P.S. § 2535.

From its beginnings as an agricultural school in 1855, the University broadened somewhat in 1862 when Congress passed the Morrill Act, which established land grant colleges. Act of 1862, ch. 130, 12 Stat. 503, 7 U.S.C. §§ 301 *et seq.* Under that Act, Congress provided land and other assistance for state universities that taught both agriculture and mechanical arts, provided that the state agreed to accept the terms and conditions of, and pledged to carry out, the Congressional mandate. The Commonwealth agreed to those conditions, and several years later, in 1875, the University's charter was amended by the trustees to increase the number of trustees to twenty-three, fifteen of whom were to be elected – three by the alumni and twelve by the agricultural and mechanical societies – four were *ex officio*, and the remainder were appointed by the Governor and confirmed by the Senate. Subsequently, the number of trustees was increased to its present total of thirty-two by adding six alumni trustees, by providing for an additional *ex officio* position to be filled by the Secretary of Mines (now the Secretary of Environmental Resources), and by dividing the twelve trustees formerly elected jointly by the agricultural and industrial societies so that each group would thereafter elect six. All of the changes in the charter were made by the trustees subject only to the approval of the Court of Common Pleas of Centre County (App. A, pp. 4-5, ¶¶ 16-19).[1] Thus, the present method of choosing the University's trustees evolved largely through historical events relating to its early purposes. It quite clearly did not represent a conscious decision by the Pennsylvania legislature, or any other democratically chosen body, that the limitations on the franchise were imposed for the purpose of advancing any stated policy of the Commonwealth.

[1] References designated by "App. __" are to the Appendices to this petition, and references to ¶ are to the numbered stipulations of the parties which were incorporated in the opinion of the district court.

Although the University began as an agricultural and mechanical arts school, its curriculum has broadened considerably so that there are now eleven separate schools, including Liberal Arts, Education, and Medicine. The size of the University has also grown considerably, and it now owns approximately 15,874 acres of property with a value estimated at $641 million. However, since its inception, a major portion of its funds has always come from state appropriations, with approximately one-third coming from the state during the five years prior to the filing of the complaint. In addition, the Commonwealth also provides funding for special projects, for tuition scholarships for Pennsylvania residents, and for the construction of buildings on the campus for the exclusive use of the University (App. A, pp. 8-11, ¶¶ 36-41, 44-47, 52).

It is the responsibility of the trustees to govern the University, and all powers reside in them. They have the right to hire and fire faculty, to determine courses and establish schools, to determine the budget, and to set tuition. In carrying out these responsibilities, the University employs approximately 11,000 persons on a full-time basis, including approximately 4,000 faculty members. Despite the pervasive influence that the trustees have over the lives of the students at Penn State, the selection of the twenty-one trustees whose legitimacy is challenged in this action is done entirely without participation by students. Through a complex process established by the trustees themselves, the alumni elect nine trustees for staggered three year terms, and the members of the county

industrial and agricultural societies, who need have no connection with Penn State whatever, each elect the remaining six trustees, also for staggered three year terms. It is this denial of equality in the right to vote for University trustees that is at issue in this case.

B. Proceedings Below.

The complaint in this action was filed in the United States District Court for the Middle District of Pennsylvania on April 29, 1977, alleging that the right to vote of the four named plaintiff students was being denied under the equal protection clause of the Constitution and 42 U.S.C. § 1983.[2] The complaint relied principally on this

[2] Three of the named plaintiffs were scheduled to graduate in June, 1978 and the remaining plaintiff in June, 1979. Therefore, in order to avoid the possibility that the case would become moot before reaching a final determination, *see Sosna v. Iowa*, 419 U.S. 393 (1975), the action was brought as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The district court declined to certify the class because the individual plaintiffs had not appeared at a hearing before the court, and that issue was assigned as error in the Third Circuit. In addition, in the court of appeals, petitioners moved to add an additional plaintiff, Charles Zito, who will not graduate until June, 1981. The court of appeals declined to reach the merits of the class action ruling after deciding against petitioners on the merits, finding that "their contention relating to class action determination is moot" (App. B, p. 19). It also failed to pass on the motion to add petitioner Zito as a plaintiff. The refusal to reach the class action issue and the failure to pass on the motion were assigned as errors in a timely petition for rehearing. Although that petition for rehearing was denied, the court, on March 6, 1979, granted the motion adding Mr. Zito as a plaintiff and entered an order recalling the mandate and amending the judgment to reflect that order. *See* Appendices D and E, *infra*. As a result, there is no likelihood of mootness, and the class action issue is not assigned as error in this petition.

Court's decisions in *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and its progeny, which set aside statutes restricting the right to vote for the governing boards of public education bodies and other governmental units. Subject matter jurisdiction was based on 28 U.S.C. § 1343(1). Named as defendants were each of the thirty-two trustees of the University.

After discovery was concluded, the parties filed cross motions for summary judgment and then agreed upon a stipulation consisting of 110 paragraphs and 46 exhibits that was filed with the court and which became the basis on which the district court reached its determination. Before reaching the merits, however, the district court, and subsequently the court of appeals, had to deal with the contention of the University that there was no state action involved under either *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), or *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The district court, relying on *Burton*, as interpreted by the Third Circuit's opinion in *Braden v. University of Pittsburgh*, 552 F.2d 948 (1977) (*en banc*), and its subsequent rulings on that issue, found that the requisite "symbiotic relationship" existed and that the actions of the University should be deemed the actions of the state (App. A, p. 25). In doing so, it based its ruling on the presence on the board of four state officials and six gubernatorial appointees, on the fact that approximately one third of the University's budget is provided by the Commonwealth, on the fact that more than $95 million in state construction money has been used since 1968 to build facilities exclusively for the University, and on numerous other factors that demonstrated a direct connection between the University and the Commonwealth. On the merits, however, the court rejected petitioners' arguments that under *Kramer v. Union Free School*

District, supra, the denial of the franchise must be measured under the strict scrutiny test, and found that under a less exacting standard, the exclusion of students from voting was justified (App. A, pp. 34-39).

On appeal, the Third Circuit also initially analyzed the state action issue by reviewing the history and the operations of the University and the court's prior decisions construing the meaning of state action. In doing so, it observed that state action existed "either (1) when the state and the entity whose activities were challenged are joint participants in a symbiotic relationship or (2) where the entity is pervasively regulated by the state and a sufficient nexus exists between the state and the challenged activity" (App. B, p. 10). It then "specifically adopt[ed] the [observations] and determinations of Judge Muir, the trial judge" and, relying on the factors noted above, found that the requisite symbiotic relationship existed and concluded that there was state action.

On the merits, the court of appeals also rejected petitioners' claims that *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and its progeny applied, and, in the alternative, that even under a less demanding scrutiny, the University had not justified the discrimination in denying students the right to vote.[3] Preliminarily, the Third Circuit discussed the differing levels of judicial scrutiny applied in equal protection cases. It correctly observed that strict scrutiny applies either when a classification is suspect or the rights in issue are fundamental. In other

[3] On the *Kramer* issue, the court of appeals based its decision on different reasons from those accepted by the district court. Since it is the decision of the Third Circuit on which review is sought, this petition will not discuss the rationale employed by the district court any further.

situations, it observed, "a relatively relaxed standard of judicial scrutiny" will apply, and the classification "will pass muster if the purpose of the classification bears some rational relationship to a legitimate state purpose" (App. B, p. 13). It then went on to explain that the rational basis standard "reflects the courts' awareness that the drawing of lines which create distinct classifications is peculiarly a legislative task and an unavoidable one. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)" (App. B, p. 14). It failed to recognize, however, that the classification at issue was neither "legislative" nor "unavoidable" but was created by the trustees themselves, who, along with their electorates, were the beneficiaries of it.

The court then reviewed the decisions in *Kramer, supra*, and *Hadley v. Junior College District of Kansas City*, 397 U.S. 50 (1970), cases dealing with the right to vote, respectively, in local school board elections and in elections for a junior college district of a metropolitan city (App. B, p. 15). The court concluded, however, that elections for university trustees were different because the University "cannot acquire property by condemnation, levy or collect taxes, or pass on petitions to annex school districts" (App. B, p. 16). It did so without citing any authority for that distinction, but it did rely on this Court's recent decision in *Holt Civic Club Inc. v. City of Tuscaloosa*, ___ U.S. ___, 99 S.Ct. 383, 390, 47 U.S. L.W. 4008 (1978), for the proposition that petitioners' claims fell on the other side of the *Kramer* line (App. B, p. 17).

With regard to the rational basis analysis, the Third Circuit agreed with the district court, quoting the portion of the trial court's opinion with respect to the election of

agricultural and industrial trustees which had referred to the historic basis for the University's role in those areas to justify their vote (App. B, p. 18). As for the alumni trustees, the court said that the casting of ballots evidences sufficient continuing interest in the University to justify their vote, and it also recognized the other support functions which alumni had traditionally played (App. B, pp. 18-19). In neither case did the court address the crucial issue, which is not whether the interests of the agricultural and industrial societies and alumni are sufficient to sustain a vote for their members, but whether a rational basis exists for denying a comparable right to petitioners. Petitioners sought rehearing, pointing out the failure to decide certain procedural issues (*see* note 2, *supra*) and the errors of the court on the merits, particularly the portions of the opinion equating the decision to exclude students here to a legislative determination. The court denied the petition without opinion on February 15, 1979.

REASONS FOR GRANTING THE WRIT

The Decision of the Third Circuit Is Inconsistent With Decisions of This Court and Conflicts With Decisions of Other Circuits.

1. The court of appeals broke new ground by applying the rational basis test to classifications established not by democratically elected state legislatures, but by the very body whose legitimacy was being challenged. Although the Pennsylvania legislature initially established the composition of the board, the trustees themselves thereafter had the power to amend the charter. In fact, the power of the trustees to retain or modify their own electorate was not merely stipulated by the parties, but was the very foundation upon which the respondents based their defense that there was no state action, contending that the method of trustee selection was not decided by the state.

Failing to recognize this distinction, the court of appeals deviated from the teachings of *Kramer v. Union Free School District, supra*, 395 U.S. at 628, in which this Court concluded that the presumption of constitutionality, which is the foundation of the rational basis test, is "based on the assumption that the institutions of state government are structured so as to represent fairly all the people." Since in *Kramer*, this Court refused to apply a rational basis test even though the legislature which created the voting scheme had been democratically chosen, *a fortiori*, there is no basis for applying it here, where the very persons whose offices are being contested drew the lines excluding petitioners from voting.

This Court recently discussed the reasons for applying the rational basis test, observing that the Constitution "presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process. . . ." *Vance v. Bradley*, ___ U.S. ___, 99 S.Ct. 939, 943, 47 U.S.L.W. 4176 (1979). Since in this case there is every reason to infer antipathy, and since the democratic process does not operate with respect to these decisions because they are made by the trustees themselves, the underlying reasons for deferring to a legislative classification do not apply, and the court of appeals erred in doing so. As the *Vance* opinion makes clear in numerous places, the classification there was upheld because it was made by Congress, and policy choices such as that are "ordinarily. . . to be 'fixed only by the people acting through their elected representatives.' *Fireman v. Chicago R.I. & P.R. Co.*, 393 U.S. 129, 138 (1968)."

99 S.Ct. at 946. See also *Ambach v. Norwick*, ___ U.S. ___, 47 U.S.L.W. 4387, 4390 (April 17, 1979) (rational basis test applied when classification made by "people of New York, acting through their elected representatives. . . ."). *Cf. Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1974). Because the lower court equated a privately created classification with that of a democratically elected legislature, it substantially deviated from decisions of this Court, and review should be granted to correct that ruling.[4]

2. Second, the appellate court's purported distinction based on Penn State's lack of certain powers, as compared with other bodies to which *Kramer* and its progeny have been applied, creates a conflict with decisions of the Second and Fifth Circuits, which this Court should resolve. Thus, in *Baker v. Regional High School District No. 5*, 520 F.2d 799, 801-802 (2d Cir. 1975), *cert. denied sub nom. Nonnewaug Regional School District v. Scott*, 424 U.S. 965 (1976), the court declined to distinguish *Kramer* based on the very comparison between the specific powers of the governmental units in question that was relied on by the court of appeals here (App. B, pp. 16-17). There, the principles of *Kramer* were held applicable even though the board for which the elections were held could act only if the decision was specifically ratified by the voters. Similarly, the Fifth Circuit in *Dundee v. Orleans Board of Parish Supervisors*, 434 F.2d 135, 139 (1970), applied *Kramer* where the board could not impose taxes, issue bonds, or enact legislation, but was limited to fixing the assessment on taxable property. Because of this conflict

[4] The only decisions of this Court denying strict scrutiny to elections involved legislative classifications. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Holt Civic Club Inc. v. City of Tuscaloosa, supra.*

among the circuits, and because of the potential that the decision of the Third Circuit has for re-opening avenues for litigating discriminations based on voter classifications, this Court should also grant review.

3. Finally, the reasons relied on to sustain the classification, even under a more relaxed standard of review, were wholly insufficient under the standard of scrutiny employed by this Court in cases such as *Vance v. Bradley, supra*. And to the extent that they are based on history alone, they were rejected just this term in *Illinois State Board of Elections v. Socialist Workers Party*, ___ U.S. ___, 99 S.Ct. 983, 47 U.S.L.W. 4197 (1979). In the latter case, this Court concluded that "[h]istorical accident, without more, cannot constitute a compelling state interest," *id.* at 992, a result concurred in by Mr. Justice Rehnquist, who concluded that the history which led to the present classification "does not justify it under any rational basis test, and appellant has scarcely made any effort to do so before this Court." *Id.* at 994.

In this case, the question is not whether there is a sufficient justification to allow alumni and members of agricultural and industrial societies to vote, but whether the classification which excludes students is a legitimate one. "That the distinction between state and city elections undoubtedly is valid for some purposes does not resolve whether it is valid as applied here." *Illinois State Board of Elections v. Socialist Workers Party, supra*, 99 S.Ct. at 990. As this Court made clear from its rigorous analysis of the justifications offered in *Vance v. Bradley, supra*, the fact that a classification may be tested by the rational basis test does not permit a court to abdicate its function entirely, and that at least minimal scrutiny must be employed, especially here, where the classification's origins

are highly suspect. Yet the sole grounds offered by respondents and the lower courts are that the alumni have an interest in the University and the agricultural and industrial societies have historical connections with it. While those reasons may suffice to permit those with the franchise to continue to vote, they do not provide any rationale for denying students a comparable right.[5] In light of the importance of the rights at issue, and the suspect basis upon which the classification was made, the court of appeals failed to carry out its obligation to scrutinize the discrimination which denied petitioners the right to participate in elections for the trustees of Penn State University, and review should be granted for that reason as well.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

ALAN B. MORRISON
DIANE B. COHN
Suite 700
2000 P St., N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Petitioners

THOMAS B. SCHMIDT, III
10 South Market Square
P. O. Box 1181
Harrisburg, Pennsylvania 17109
(717) 233-8483
Of Counsel

May 15, 1979

[5] Neither the district court nor the court of appeals made a finding that the decisions of the trustees have a disproportionately greater effect on alumni or the members of the agricultural and industrial societies than on students. *Compare Salyer Land Co. v. Tulare Lake Basin Water Storage District, supra,* 410 U.S. at 728.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DRIANNE BENNER, et al., Plaintiffs	:	Civil No. 77-351
vs.	:	Complaint Filed 4/29/77
JOHN W. OSWALD, President of The Pennsylvania State University, et al., Defendants	:	(Judge Muir)

OPINION

MUIR, District Judge.

I. Introduction.

Drianne Benner and three other undergraduate students at the Pennsylvania State University (Penn State) have filed this action pursuant to 42 U.S.C. § 1983 alleging that the method of selection of the members of the Board of Trustees of Penn State which does not permit undergraduate students to elect representatives to the Board of Trustees violates their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On December 6, 1977, all Defendants except Defendants Shapp, Shelhamer, Kline, and Goddard filed a motion for summary judgment accompanied by a brief. On December 15, 1977, the remaining Defendants joined in the motion. On December 20, 1977, Plaintiffs filed a cross-motion for summary judgment accompanied by a brief in support of their motion and in opposition to the Defendants' motion. On December 23, 1977, Defendants filed a reply brief. On January 3, 1978, the case was submitted to the Court on the basis of a case stated with all parties

electing to rely upon the briefs already submitted. The Court deems this submission of the issues on a case stated basis to constitute withdrawal of the motions for summary judgment. The following are the Court's findings of fact, discussion, and conclusions of law.

II. Findings of Fact.

1. Plaintiffs are four undergraduate students enrolled in various courses of study at The Pennsylvania State University. (U)

2. James Scarantino is twenty-one years old and an undergraduate student at the University, in the College of Liberal Arts. He entered the University in 1974, and expects to graduate in 1978 with the degree of Bachelor of Arts. His major fields of study are political science and economics. Plaintiff Scarantino has taken an active interest in the affairs of the University. He was Coordinator of Students for PennPIRG, and was elected Undergraduate Student Government Senator in 1976. He is chairman of the Organization for Town Independent Students and former chairperson of that organization's *ad hoc* Housing Study Committee. He is a member of Omicron Delta Kappa and Skull and Bones Honor Societies. He is also a registered voter in Centre County, Pennsylvania. (U)

3. Ann Ziminski is twenty-one years of age. She entered the University in 1974, and expects to graduate with the degree of Bachelor of Science in the College of Agriculture in 1978. Her major field of study is Environmental Resources Management. She was the President of Eco-Action and a member of the Free University, both of which are University student organizations. She is a registered voter in Centre County, Pennsylvania. (U)

4. Jeffrey Glazier is twenty years of age. He entered the University in 1975, and expects to graduate with the degree of Bachelor of Arts in the College of Liberal Arts in 1979. His major field of study is Labor Studies. He is a resident of University student housing and Vice President of the Association of Residence Hall Students, an organization of approximately 10,000 student members at the University. He was a member of the Student Litigation Organization and is a member of East Halls Radio, both of which are University student organizations. He is a registered voter in Lehigh County, Pennsylvania. (U)

5. Drianne Benner is twenty-one years of age. She entered the University in 1974, and expects to graduate with the degree of Bachelor of Arts in the College of Liberal Arts in 1978. Her major field of study is Political Science and History. She was an active member of Students for PennPIRG, a University student organization. She is a registered voter in Centre County, Pennsylvania. (U)

6. The Plaintiffs would like to participate in the election of trustees of the University and do not believe it is proper that others whom Plaintiffs believe have little or no relationship to the University, can participate in the election process while they have no such right. They are committed to working to change the election process and to that end intend to pursue this action vigorously. (U)

7. The Defendants are 32 persons who, at the time of the initiation of this action, comprised the Board of Trustees of The Pennsylvania State University. (U)

8. Defendants Milton J. Shapp, Kent Shelhamer, Caryl Kline and Maurice K. Goddard are ex-officio members because of their status as Governor, Secretary of Education, Secretary of Agriculture, and Secretary of Environmental Resources, respectfully. (U)

9. Defendants Harry Boyer, Helen Davies, Joseph Rhodes, Jr., Robert L. Ruttenberg, Dion C. Stewart and William K. Ulerich have been appointed to the Board by the Governor. (U)

10. Defendants H. Jesse Arnelle, Marian U. Barash, Walter J. Conti, Barbara H. Franklin, Ralph Hetzel, Kenneth L. Holderman, Charles W. Schaeffer and Helen Wise are the members of the Board representing the alumni. (U)

11. Defendants J. Lin Huber, John M. Phillips, John R. Pitzer, Jr., Luther Snyder, Harry R. Ulrich and J. Lewis Williams were selected as Board members by delegates representing county agricultural societies. (U)

12. Defendants H. Thomas Hallowell, Jr., Samuel F. Hinkle, John L. Romig, Stanley G. Shaffer, G. Albert Shoemaker and Quentin E. Wood were selected as Board members by delegates representing county engineering, mining and manufacturing societies. (U)

13. Defendant Oswald is an ex-officio member of the Board as the President of The Pennsylvania State University. (U)

14. These trustees were all selected in accordance with provisions of the corporate charter of the University. (U)

15. The Pennsylvania State University was incorporated by an Act of the Legislature of the Commonwealth of Pennsylvania in 1855. Act of February 22, 1855, P.L. 46. (U)

16. On March 13, 1867, the Board of Trustees of the University accepted the benefits of the Morrill Act as designated by the Legislature of the Commonwealth of Pennsylvania. Submitted herewith as Exhibit D26 is a certified

copy of the relevant portion of the minutes of that meeting of the Board. (U)

17. On August 28, 1878, the Executive Committee of the Board of Trustees accepted the provisions of the Constitution of the Commonwealth of Pennsylvania of 1874. Submitted herewith as Exhibit D25 is a certified copy of the relevant portion of the minutes of that meeting of the Board. (U)

18. There have been numerous amendments to the charter changing the number of trustees and the manner of their selection. These amendments have been adopted by the Board of Trustees and approved by the Court of Common Pleas of Centre County. (Exhibits 35 through 45). These amendments were made by the Board of Trustees in conformance with the applicable corporate law in effect from time to time. (U)

19. The present charter provides that the Board shall consist of five ex-officio members (the Governor, Secretary of Education, Secretary of Agriculture, Secretary of Environmental Resources, and the President of the University); six members appointed by the Governor, nine members selected by the General Alumni Association; six members selected by delegates representing county agricultural societies in the Commonwealth; and six members selected by delegates representing county engineering, mining, manufacturing and mechanical societies. (U)

20. The authority, duties and functions of the Board of Trustees of the University, as well as the duties of the President and other officers of the Board, are set forth in the following documents: (a) the Corporate Charter (a true copy of which is submitted herewith as Exhibit D1); (b) the Corporate Bylaws (a true copy of which is submitted here-

with as Exhibit D2); and (c) the Standing Order of the Board, adopted on June 11, 1970, as amended on November 19, 1971 and May 30, 1975, (a true copy of which is submitted herewith as Exhibit D3). (U)

21. The President's duties as Secretary of the Board are set forth in Article 2, Section (4) of the Bylaws (Exhibit D2). He is custodian of the corporate seal; he conducts the ordinary correspondence of the Board; and he maintains an accurate record of all proceedings of the Board. (U)

22. The current Bylaws of the Board (Exhibit D2) were adopted by resolution of the Board on November 13, 1970. (U)

23. Both the deliberations of the Board and the adoption of the Bylaws occurred without the participation of either the executive or legislative branches of state government, except to the extent that the state government ex-officio members and the gubernatorial appointees participated as members of the Board of Trustees. (U)

24. The Governor of the Commonwealth does not attend the meetings of the Board. The present Governor has designated a personal representative to attend meetings as a non-voting observer. (U)

25. In connection with the adoption of the Bylaws, there was no direction or recommendation emanating from the Governor, the Pennsylvania Department of Education, the State Board of Education or any other department of the executive branch or from the legislative branch, of the Commonwealth of Pennsylvania. (U)

26. The Bylaws provide for the organization and meetings of the Board, the duties of the officers of the Board,

the functions of the committees of the Board and other miscellaneous matters. (U)

27. The activities of the Board, and of the officers of the Board, and of the committees of the Board, conducted pursuant to the Bylaws, occur without participation by either the executive or legislative branches of state government, except to the extent that the state government ex-officio members and the gubernatorial appointees participate as members of the Board of Trustees. (U)

28. In connection with the activities and functions provided for in the Bylaws, there is no direction to the Board from the Governor, the Pennsylvania Department of Education, the State Board of Education or any other department of the executive branch, or from the legislative branch, of the Commonwealth of Pennsylvania. (U)

29. The Bylaws make no provision for the participation of executive or legislative branches of the Commonwealth in the activities and functions controlled by the Bylaws. (U)

30. The duties of the President of the University have been established by the Board of Trustees by Standing Order of the Board, (Exhibit D3). (U)

31. The Standing Order of the Board (Exhibit D3) adopted June 11, 1970, provides for the governance of the University. (U)

32. Both the deliberations and the adoption of the Standing Order occurred without the participation of either the executive or legislative branches of state government, except to the extent that the state government ex-officio members and the gubernatorial appointees may have participated as members of the Board of Trustees. (U)

33. The functions of the Board of Trustees, the President of the University, the faculty, the students and the University Council provided for in the Standing Order occur without the participation of either the executive or legislative branches of state government. (U)

34. There has been no direction or recommendation to the Board, to the President, to the faculty, to the students or to the University Council from the executive or legislative branches of the Commonwealth with respect to the governance of the University. (U)

35. The Standing Order makes no provision for the participation of executive or legislative branches of the Commonwealth in the activities and functions controlled by the Standing Order. (U)

36. The University's committment under its designation as the land grant institution of the Commonwealth is to be an institution where the leading object is, without excluding other studies, to teach such branches of learning as are related to agriculture and the mechanic arts. (U)

37. Pursuant to the commitment made by the Act of April 1, 1863, P.L. 213, 24 P.S. §2571, et seq., the Commonwealth of Pennsylvania provides for an annual appropriation to the University. (U)

38. In the last five fiscal years the amounts appropriated, and the percentage of total revenues these amounts epresent, have been as follows:

	1971-72	1972-73	1973-74
Amount Appropriated	76,200,000	82,694,000	87,106,895
% of Total Revenues	34.9%	33.8%	33.5%

	1974-75	1975-76	
Amount Appropriated	94,087,520	102,685,610	
% of Total Revenues	32.4%	31.2%	(U)

39. The state appropriation is a so-called "non-preferred" appropriation which requires a two-thirds vote of the Legislature and which is made only after the state government budget is enacted and funded. (U)

40. The Commonwealth of Pennsylvania has made grants for special projects during the past five years in the following amounts:

	1971-72	1972-73	1973-74
Amount of Contracts	3,438,104	4,290,354	4,923,934
% of Total Revenues	1.6%	1.8%	1.9%

	1974-75	1975-76	
Amount of Contracts	6,185,832	6,291,555	
% of Total Revenues	2.1%	1.9%	(U)

41. Students at The Pennsylvania State University have received scholarships from the Pennsylvania Higher Education Assistance Agency in the following amounts for the past five years:

	1971-72	1972-73	1973-74
Total Scholarships	6,621,371	7,475,077	8,139,215
% of Tuition	14.5%	14.8%	15.3%

	1974-75	1975-76	
Total Scholarships	9,517,385	9,042,161	
% of Tuition	16.1%	13.3%	(U)

42. For fiscal year July 1, 1977 through June 30, 1978, the Legislature was nearly six months late in providing an appropriation to the University because funds were not available; consequently, the University borrowed funds in its own name in order to continue operating. The Commonwealth of Pennsylvania is not obliged to repay the borrowed funds. (U)

43. Submitted herewith as Exhibits D4 through D12 are the annual appropriation acts for the years 1970, 1971, 1972, 1973, 1974, 1975 and 1976. (U)

44. The General State Authority has provided physical facilities to the University for many years. Since 1968 the General State Authority has constructed on the campuses of the University educational buildings valued at approximately 95 million dollars. (U)

45. The General State Authority improvements were made pursuant to the General State Authority Act of 1949, as amended, 1949, March 31, P.L. 372, § 4, 71 P.S. 1707.4, which provides:

> "The Authority is created for the purpose of constructing * * * additions and improvements to land grant colleges, the University of Pittsburgh and Temple University * * *." (U)

46. Legal title to the buildings and the land upon which buildings are constructed by the GSA are situate is in the General State Authority. In every instance, the University has conveyed fee simple title to the land by general warranty deed. (U)

47. The University utilizes the GSA buildings in its educational functions and for no other purpose.

48. The employees of the University may be members of the State Employes' Retirement System. 71 Pa. C.S. § 5101 et seq. (U)

49. The University pays its employer's contribution into the State Employes' Retirement System fund from its general operating revenues. (U)

50. Roads on the campuses of the University may be constructed by the Pennsylvania Department of Transportation, 36 P.S. § 670-601. (U)

51. The University has had the ability to issue tax exempt bonds and has done so in the past. (U)

52. The University owns approximately 15,874 acres of land, with its total property holdings valued at approximately $641,000,000. (U)

53. For the Fall Term of 1976, excluding continuing education enrollments, there were 42,741 students enrolled as undergraduate degree candidates and 6,031 students enrolled as graduate and medical degree candidates. There were 4,591 students enrolled in non-degree programs. (U)

54. The University employs approximately 11,500 persons on a full time basis. (U)

55. In December and January of each year, the University sends to each county agricultural extension director the list of agricultural societies which were eligible to send delegates to the selection of agricultural trustees, during the previous commencement week. (U)

56. Each county agricultural extension director determines whether the agricultural societies for their respective counties are in existence and also determines whether

there are new agricultural societies to be added to the list of those eligible to send delegates. (U)

57. Exhibit 32 is a list of the 397 agricultural societies eligible to send delegates. (U)

58. The Secretary of Agriculture of the Commonwealth also receives a copy of the list for review, and returns to the University the Department of Agriculture's most recent booklet containing names and addresses of agricultural organizations and fair associations. (U)

59. In December and January of each year, the University sends the list of industrial societies and associations which were eligible to send delegates to select industrial trustees during the previous commencement week to the Secretary of Environmental Resources, the Executive Secretary of the Pennsylvania Society of Professional Engineers, the Secretary of the Pennsylvania Manufacturers' Association, and the Assistant Deans for Continuing Education in the Colleges of Engineering and Earth and Mineral Sciences. (U)

60. The list is reviewed to determine whether the industrial organizations listed are in existence and also whether there are new industrial organizations to be added to the list which are eligible to send delegates. (U)

61. Exhibit 33 is a list of the 160 mining, manufacturing and engineering societies eligible to send delegates. (U)

62. After the lists of agricultural and industrial societies have been returned to the University in February, a letter is sent in March to the secretaries of each organization on the lists (Exhibit D13), inviting the organization to participate in the election under the provisions of the charter of the University. A card is enclosed which is to be re-

turned to the University, signed by the secretary of the society, giving the names of the delegate or delegates authorized to represent that organization (Exhibit D14). Three credential cards (Exhibit D15) are also enclosed with the letter (Exhibit D13) to be signed by the association secretary and provided to the delegates for presentation at the registration desk on the day of election. The University then informs each delegate by letter of the time and place of the election (Exhibit D16). (U)

63. Approximately 450 delegates participate annually. In 1977, there were 207 delegates representing agricultural societies, and 198 delegates representing industrial societies. (U)

64. Each delegate is required to sign a registration card on the day of the election (Exhibit D17). At the time of registration for the election, each delegate receives a copy of instructions for the election procedure (Exhibit D18). (U)

65. Candidates for the election are nominated by the delegates at the time of the election. If not more than two candidates for election are nominated, the election is by acclamation and the secretary is instructed to cast a unanimous ballot for the two candidates. (U)

66. In the event of a contested election, all the delegates of each county receive not more than three ballots to be used in the election (Exhibit D19). The two candidates receiving the highest number of votes are elected. (U)

67. In 1977, there were four candidates for the two trustee positions to be elected by the delegates of the agricultural societies. (U)

68. In 1970 there were three candidates for the two trustee positions to be elected by the delegates of the agricultural societies and three candidates for the two trustee positions to be elected by the delegates of the industrial societies. (U)

69. In all other elections since 1970, there has been no contest. (U)

70. J. Lewis Williams is a farmer and has owned and operated a large dairy farm near Uniontown, Fayette County, Pennsylvania for 27 years. He is a member of the Board of Trustees of The Pennsylvania State University, having been first elected to the Board of Trustees by the organized agricultural societies and associations of Pennsylvania in 1955 and having served continuously thereafter, being reelected in 1958, 1961, 1964, 1967, 1970, 1973 and 1976. He is currently Vice Chairman of the Board of Trustees. (U)

71. J. Lewis Williams is a member of the Fayette County Agricultural Improvement Association of Fayette County and consequently eligible to serve on the Board of Trustees. (U)

72. The Fayette County Agricultural Improvement Association of Fayette County is a private organization, with the purposes of supporting agriculture in the County and conducting the County Fair. Submitted herewith as Exhibit D28 are the Articles of Incorporation of the Association. (U)

73. The election of agricultural trustees occurs as follows. Upon receipt of notice of the election from the University, each society or association meets to decide upon delegates and candidates. With respect to delegate

selection, the manner of selection is informal. Members of the society or association may volunteer to be delegates or they may be appointed or elected. The credential cards are given by the secretary of the society or association to the persons selected to be the delegates. Although the practice varies, some societies or associations pay the mileage expense of the delegates for travel to the election. (U)

74. With respect to the selection of candidates, the society or association generally instructs the delegates to vote for two particular individuals. (U)

75. The society or association will be aware of the names and background of the candidates because of the endorsements of certain state-wide farm organizations. The leadership of the Pennsylvania State Grange, a private voluntary organization of persons interested in agricultural pursuits, normally endorses candidates and either formally or informally informs the Pomona Granges, which are organized on a county basis, of its endorsements. The leadership of the Pennsylvania Farmers Association, a private voluntary organization of persons interested in agricultural pursuits, also normally endorses candidates and either formally or informally informs its county chapters of its endorsements. Finally, the Pennsylvania State Council of Farm Organizations endorses candidates. This Council is composed of persons from various state-wide farm organizations. Endorsement requires a unanimous vote of approval by the executive committee of the Council. (U)

76. The societies and associations may also receive communications from the candidates and may receive information concerning a candidate from a County Agricultural Extension Office of the University. (U)

77. The executive and legislative branches of the Commonwealth of Pennsylvania do not participate in the elections of trustees by the delegates or the organized agricultural societies of Pennsylvania, and do not attempt to influence or make recommendations with respect to such elections. (U)

78. The election of trustees by the engineering, mining, manufacturing and mechanical societies and associations is conducted largely through and under the auspices of the Pennsylvania Manufacturers' Association (hereinafter called PMA). (U)

79. The PMA was organized in 1909 as a nonprofit, unincorporated association having as its purpose the promotion of "the welfare of its members and the economic prosperity of the Commonwealth of Pennsylvania and its manufacturing and service industries." Submitted herewith as Exhibit D29 are the Articles of Agreement of PMA. (U)

80. The PMA is a broadbased organization with over five thousand (5000) dues paying members, comprised of individual members, organizational members, and trade association members in Pennsylvania. It is governed by a Board of Governors consisting of 24 persons who are elected by the members. The Board of Governors elects a Chairman of the Board, President, Secretary, Treasurer and an Executive Committee composed of five members of the Board of Governors plus the chairman of the Board and the President. (U)

81. Pursuant to Article XI of the Articles of Agreement (Exhibit D29), the PMA has local chapters and appointed secretaries in 41 counties of the 67 in the Commonwealth of Pennsylvania. The local county chapters

are governed by the Articles of Agreement (Exhibit D29) and do not have separate articles or bylaws. In addition, PMA maintains liason with autonomous manufacturing associations located in 13 counties. (U)

82. Annually, the Board of Governors and the Executive Committee of the Board of Governors endorses candidates for election to the industrial segment of the Board of Trustees of The Pennsylvania State University. The endorsements are made after interviews of the candidates by the officers of PMA. (U)

83. The candidates endorsed by PMA are members of the industrial community who are interested in the University and willing to take the time to attend Board meetings and otherwise participate responsibly in the activities of the University. (U)

84. The PMA participates in the election of the industrial trustees based upon its system of local chapters, which are present in 41 counties, and based upon its liason with the autonomous manufacturing associations. The administration staff of the PMA selects the delegates to represent its local chapters and the autonomous manufacturing associations, and instructs the delegates to vote for the candidates endorsed by the Board of Governors. (U)

85. A few associations or societies not affiliated with PMA send delegates to the election; however, the majority of delegates represent the PMA and through it, a system of PMA local chapters and the 13 autonomous associations. (U)

86. The executive or legislative branches of the Commonwealth of Pennsylvania do not participate in the elections of trustees by the delegates of the organized engineering, mining, manufacturing and mechanical societies of

Pennsylvania, and do not attempt to influence or make recommendations with respect to such elections. (U)

87. During the period 1962 through 1977, inclusive, with only one exception, no trustee who was a gubernatorial appointee or who was an ex-officio member participated as a chairman or election teller of the meertings of the society delegates to elect trustees. The exception was that in 1963, H. Beecher Charmbury, an ex-officio member of the Board by virtue of being Secretary of Mines (now Secretary of Environmental Resources), was an election teller for the balloting to select trustees representing the industrial societies. (U)

88. The organizations which send delegates to elect trustees representing county agricultural and mechanical societies are private entities. (U)

89. With respect to the annual election by the General Alumni Association, Richard E. Grubb is responsible for the administrative procedures for the election. (U)

90. Not later than February 1 of each year nomination ballots are mailed by the University to alumni who have been active members of the Alumni Association or who have contributed to the University within the past two years or who specifically request a nomination ballot. Approximately 50,000 nomination ballots are mailed. All nominees receiving 50 or more votes are eligible for the election if they so consent. (U)

91. There are normally between eight and 12 nominees for three positions. Positions on the election ballot are determined by drawing of lots by the Associate Secretary of the Board in the presence of the nominees or their representatives (Exhibit D21). The Chairman of the Board

of Trustees, the President of the University, the Alumni Association and all candidates are notified of the order of names on the ballot. (U)

92. Early in April, the Chairman of the Board appoints two alumni trustees not running for reelection to serve as judges of the election. (U)

93. Election ballots are mailed to the alumni no later than April 15 and must be returned no later than 8:30 a.m., the day of the election. Approximately 14,000 alumni cast their ballots each year. (U)

94. On the election day, the ballots are machine counted under the supervision of the two judges of election. The three candidates receiving the highest number of votes are elected. (U)

95. Submitted herewith as Exhibit D20 is a copy of a document entitled "The Pennsylvania State University, Procedure for Nomination and Election of Trustees by Alumni" which was prepared under the supervision of Richard E. Grubb in November, 1976, and which contains a complete statement of all procedures, as well as copies of all forms which are used in connection with the election. (U)

96. Submitted herewith as Exhibit D22 is a copy of a letter, dated March 11, 1977, from Richard E. Grubb to W.K. Ulerich, President of the Board of Trustees, informing him of the drawing for positions on the ballot for the 1977 alumni election, which letter is representative of the letters sent by Richard E. Grubb in connection with each annual alumni election. (U)

97. Attached hereto as Exhibit D23 is a copy of a letter dated March 17, 1977, from Richard E. Grubb to W.K. Ulerich, President of the Board of Trustees, informing him

of his responsibility to appoint judges of the elections and that it is traditional to appoint judges from the trustees previously elected by the same category of electors, which letter is representative of the type of letter sent each year by him in connection with the elections. (U)

98. The executive and legislative branches of the Commonwealth of Pennsylvania do not participate in the election of trustees by the alumni, and do not attempt to influence or make recommendations with respect to such elections. (U)

99. The University offers educational programs related to agricultural and the mechanic arts, as well as other university-level educational programs. Submitted herewith as Exhibit D27 is the University Bulletin for the current academic year, which sets forth the agricultural and mechanic art educational programs of the University at pages 48-71, 104-119 and 149-164. (U)

100. The records of the University contain a document entitled "membership List and Biographical Information, the Board of Trustees, The Pennsylvania State University, July 1, 1977," which contains the names and biographical data for each current trustee of the University. This document is submitted herewith as Exhibit D24. (U)

101. For the period 1953 through 1977, alumni have contributed the sum of $11,247,076 to the University through lifetime gifts or by testamentary bequests. (U)

102. For the period 1970 through June 30, 1977, alumni have contributed the sum of $6,813,409 to the University through lifetime gifts or by testamentary bequests. (U)

103. The Alumni Association of The Pennsylvania State College was originally formed in 1870. It was incorporated

as a nonprofit corporation under the laws of the Commonwealth of Pennsylvania on January 26, 1924, and continues in existence as a nonprofit corporation to this date. A true and correct copy of the Articles of Incorporation is submitted herewith as Exhibit D30. (U)

104. One of the purposes of the Association stated in the corporate charter is "to promote the best interests of the Pennsylvania State College." Through programs sponsored or assisted by the Penn State Alumni Association, alumni have participated in numerous activities which promote the interests of the University. The "Alumni Fellows" program, sponsored by the Association and the deans of the various colleges of the University, brings prominent alumni to the University for a three to five day period during which they participate in seminars, attend classes and consult informally with students and faculty. Those chosen as "Alumni Fellows" have distinguished records in their occupations and professions, and serve as a valued source of information and assistance to students and faculty in their respective disciplines. A copy of the 1977 Alumni Fellows Booklet describing the alumni who participated and some of their activities, is attached hereto as Exhibit D31. (U)

105. The Alumni Council is the 50-member governing body of the Association. The Council reviews matters which are of interest to the continued growth of the University, and offers counsel and support to the Board of Trustees on issues before the Board. It assists in the placing of students in the Internship Program administered by the Placement and Student Aid Offices, whereby qualified students spend one term working in industry to obtain practical experience in their field. It assists the Placement Office in obtaining employment for students following graduation. In addition, the Council has been the source

of valuable assistance and information in instances when the Board of Trustees or the administrative officers of the University have made specific requests on a particular matter. (U)

106. Eight colleges of the University have formed informal college alumni associations, comprised of alumni working in fields related to the particular college. Members of these groups return to campus to participate in lectures, seminars and other academic functions. These alumni also attend "career days" sponsored by the colleges, to provide students with an opportunity to obtain information about career opportunities for graduates in those colleges. (U)

107. Annually, the Board of Trustees adopt the operating budget for the University for the fiscal year beginning July 1. (U)

108. In connection with adopting the budget, the Board also determines the level of tuition to be paid by students in the next academic year. The level of tuition is based upon estimates of expense and of income from other sources, including the estimated amount of the state appropriation, endowment income, recovery of indirect costs on government contracts and other miscellaneous sources. (U)

109. For the Fall and Winter academic terms of 1977, the tuition for Pennsylvania residents was $421.00 per term. the tuition for non-residents of Pennsylvania was $881.00 per term. (U)

110. The determination of the level of tuition is made solely by the Board of Trustees without direction by either the executive or legislative branches of the Commonwealth of Pennsylvania. (U)

III. Discussion.

The Plaintiffs, four undergraduate students at Penn State, allege that the selection of the members of the Board of Trustees is an action taken under color of state law so that 42 U.S.C. §1983 is applicable, and that permitting Penn State alumni, members of local agricultural societies, and members of local industrial societies to select trustees while refusing to permit undergraduate students to do so violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Defendants contend both that the selection of the members of the Board of Trustees of Penn State is not "state action" within the meaning of §1983 and that, assuming that state action exists, there is a rational basis for the distinction drawn between undergraduate students and other persons who are permitted to select trustees so that the equal protection clause is not violated. The Court will deal with these contentions *seriatim.*

Defendants argue that the Pennsylvania State Univesity, although initially chartered by the Pennsylvania State legislature and subsequently converted into a "land grant" college, remains a private institution and that the actions of the members of the Board of Trustees, including amending Penn State's charter which governs the method of selecting the Board members, are private and not state actions and are not subject to the strictures of the equal protection clause. They contend that although the Commonwealth of Pennsylvania supplies funds for the operation of Penn State, no members of either the executive or the legislative branches of the Commonwealth other than the ex officio members of the Board of Trustees and the trustees appointed by the governor participate in formulating essential Penn State policy so that the requisite connection between the Commonwealth of Pennsylvania and Penn State's activities is not present.

For the following reasons, the Court concludes that all of Penn State's actions are state actions within the meaning of 42 U.S.C. §1983.

Consideraton of whether the actions of Penn State's Board of Trustees constitute state action begins with an analysis of the decision of the United States Court of Appeals for the Third Circuit in Braden vs. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977). In *Braden*, the Court set forth in detail two tests which have been developed by the United States Supreme Court for determining whether state action exists. In Burton vs. Wilmington Parking Authority, 365 U.S. 715 (1961) the Supreme Court found that a coffee shop which leased space in a building owned by the Wilmington Parking Authority acted under color of state law when it discriminated against customers on the basis of their race. The Court stated that the activities of the coffee shop and parking authority were so entwined that a "symbiotic relationship" existed and that the actions of the coffee shop could well be deemed the actions of the Authority itself. In Jackson vs. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court, faced with a question of whether a regulated utility was required to afford a customer a hearing before terminating her services, held that the fact that the business is subject to state regulation is not of itself an indication of state action, but that where such regulation exists, inquiry must be made as to "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." Jackson vs. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) *citing* Moose Lodge No. 107 vs. Irvis, 407 U.S. 163, 176 (1972). These two decisions were reconciled in Braden vs. University of Pittsburgh, 552 F.2d 948, 958 (3d Cir. 1977) where the Court of Appeals stated that a state action exists in either

of two situations: When the state and the entity whose activities were challenged are "joint participants" in a "symbiotic relationship" or where the entity is pervasively regulated by the state and a sufficient nexus exists between the state regulation and the challenged activity. If the former situation is found to exist, all of the entity's actions are state actions and a nexus between any state regulation and the action need not be shown. "[T]he state's extensive participation in [a] comprehensive program may obviate a need to show involvement in the specific activity challenged." Hollenbaugh vs. Carnegie Free Library, 545 F.2d 382, 385 (3d Cir. 1976). It is this Court's view that the Commonwealth of Pennsylvania and Penn State bear such a close and substantial relationship to each other that the actions of the latter are substantially intertwined with the actions of the former so that the test enunciated in Burton vs. Wilmington Parking Authority, 365 U.S. 715 (1961) is met and the Court need not inquire as to whether the Commonwealth has any extensive involvement in the actual activity complained of, namely the selection of the Board of Trustees.

The Court of Appeals in Braden vs. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977), did not decide whether actions taken by the University of Pittsburgh constituted state action for purposes of §1983 but the Court set forth several factors which should be considered in determining whether the necessary symbiotic relationship exists between a university and the Commonwealth. Those factors include the extent of the Commonwealth's participation in determining who sits on the Board of Trustees, whether the Commonwealth undertakes an extensive review of the expenditure of the University's funds, whether the University is required to report certain expenditures to the Commonwealth, whether the legislature intended to make use of the facilities

of the University for its own purposes, and whether any statutory declarations exist as to whether the University is a state institution. The Court of Appeals also relied heavily upon then-District Judge Higginbotham's opinion in Isaacs vs. Board of Trustees of Temple University, 385 F.Supp. 473 (E.D. Pa. 1974) which held that Temple University engaged in state action. In *Isaacs*, 385 F.Supp. at 478, the Court noted its reliance on various other factors, including the extent to which the Commonwealth funded Temple's operations, the fact that Temple was permitted to share in benefits which the Commonwealth has made available for capital improvements, the fact that the Commonwealth had in fact assumed most of the responsibility for Temple's capital development, the fact that Temple lobbied actively in Harrisburg when its budget was being considered by the state legislature, the fact that the Commonwealth audited Temple's expenditures, and the fact that Temple had become increasingly dependent on Commonwealth subsidies. All these things taken together constituted Pennsylvania's "significant involvement" in the affairs of Temple University.

Keeping these factors in mind, the Court turns to the consideration of Penn State's situation. The parties' undisputed findings of fact indicate that the Governor of Pennsylvania, the Secretary of Education, the Secretary of Agriculture, and the Secretary of Environmental Resources are all ex officio members of the Board of Trustees. Six other members out of a total membership of 32 on that Board are appointed by the Governor. Penn State is obligated to teach, among other subjects, both agriculture and mechanical arts by virtue of its agreement with the Commonwealth. The Commonwealth is committed to an annual appropriation to Penn State and has made such appropriations since 1863. The sums of money appropriated to Penn State by the Commonwealth have constituted 34.5%, 33.8%, 33.5%,

32.4% and 31.2% of Penn State's total revenues for fiscal years 1971-72, 1972-73, 1973-74, 1974-75, and 1975-76, respectively. The General State Authority an agency of the Commonwealth, is authorized to construct physical facilities on Penn State's campus and has in fact constructed over $95,000,000 of such facilities since 1968. The General State Authority owns all such buildings which are situated on the Penn State campus. Penn State's employees may participate in the state employee's retirement system and the University pays contributions to that system. The Pennsylvania Department of Transportation is authorized to construct roads on the Penn State campus. In addition to those undisputed facts, the Court takes judicial notice of the opinions of the Pennsylvania Attorney General which have held that Penn State is a state institution for purposes of exemption from the gasoline tax, the Pennsylvania inheritance tax laws, and the Capital Stock Tax, *see* Ops. Atty. Gen. December 21, 1921, December 23, 1921 and January 10, 1939, and that the annual appropriations acts impose auditing restrictions on Penn State very similar to those applicable to Temple University which are found in the Act of July 28, 1966, P.L. 87, §7, 24 PA. STAT. ANN. §2510-207. The Court believes it is unquestionable that from the foregoing facts the Commonwealth has direct participation in determining at least some of the members of the Board of Trustees, that the Commonwealth does review Penn State's expenditure of Commonwealth funds, that the legislature intended Penn State to be a state educational institution, that the Attorney General of Pennsylvania has consistently regarded Penn State as such an institution, that Penn State partakes of benefits available for its capital development, that it relies exclusively upon the general state authority for such development, and that Penn State is substantially dependent on Commonwealth subsidies. Therefore, the requisite amount of "significant involvement" by the Commonwealth in Penn

State's affairs is present and, under Burton vs. Wilmington Parking Authority, 365 U.S. 715 (1961), Penn State's actions are "state actions." The Court recognizes that several cases cited by Defendants indicate that some Pennsylvania courts have held that Penn State is not a state agency for various state purposes but those decisions do not deal with the question of whether Penn State's actions are state actions within the meaning of 42 U.S.C. §1983 and are not binding upon this Court.

Although Defendants have represented in their brief that whether state action is present in Penn State's personnel activities is not an issue in this case, the Court believes that a fair reading of Braden vs. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) indicates that this Court should decide on the basis of the Commonwealth's substantial involvement with Penn State that all of the latter's activities are state actions. Whether any other Courts have so decided is of moment. In Klain vs. Pennsylvania State University, 434 F.Supp. 571, 574 (M.D. Pa. 1977) (Herman, J.) the Court held that Penn State had a sufficient nexus with the Commonwealth of Pennsylvania so that its actions were state actions. The attorneys representing Penn State in this case also represented the University before Judge Herman. The Court is disturbed by counsel's failure to bring Judge Herman's decision to the attention of this Court.

Because the Court has held in favor of the Plaintiffs on the question of state action, it must now determine whether the method which Penn State uses to select the members of its Board of Trustees violates the Equal Protection Clause. The Plaintiffs may make out a violation of their equal protection rights in two ways. First, if the Board's procedures are to be subject to strict judicial scrutiny, the Plaintiffs must first establish that the selection process is

an "election" rather than an appointive process. *Compare* Avery vs. Midland County, 390 U.S. 474 (1968) and Hadley vs. Junior College District, 397 U.S. 50 (1970) *with* Sailors vs. Board of Education, 387 U.S. 105 (1967) *and* Dusch vs. Davis, 387 U.S. 112 (1967). Second, they must show that Penn State is an entity exercising traditional governmental functions rather than a special purpose governmental unit. *Compare* Hadley vs. Junior College District, 397 U.S. 50 (1970) *with* Salyer Land Co. vs. Tulare Water District, 410 U.S. 719 (1973). If Plaintiffs can meet their burden of demonstrating that the scheme utilized by the Board constitutes an election of general interest of a traditional governmental body and that Plaintiffs have been denied the franchise, the burden shifts to the Defendants to demonstrate that the exclusion of the Plaintiffs from the selection process is not necessary to further a compelling state interest. *See* Hill vs. Stone, 421 U.S. 289 (1975); Kramer vs. Union Free School District, 395 U.S. 621 (1969). If the Plaintiffs fail to demonstrate that the method of selecting the Board members is such an election, however, then the inclusion of Penn State alumni and members of agricultural and industrial societi s and the exclusion of students from the selection process must be upheld so long as there is some rational basis for the distinction drawn between the groups. *See* Massachusetts Board of Retirement vs. Murgia, 427 U.S. 307 (1976); McGowan vs. Maryland, 366 U.S. 420 (1961).

In Sailors vs. Board of Education, 387 U.S. 105 (1967), the Court was faced with an equal protection challenge to Michigan's scheme of selecting members of its county school boards. The members of local school boards were elected by popular vote of the residents of the School District and those boards in turn selected delegates from among their members who, at a biannual meeting, chose a 5-mem-

ber county school board. The Court indicated that had Michigan provided for direct election of the members of the County school board, each person voting in the election would have been entitled to have his vote weighed equally with every other person's vote but that there was no constitutional mandate that Michigan provide for such direct election of local governmental officials. Plaintiffs concede this point and state that they have no objection to the appointment of members of Penn State's Board of Trustees by the governor or the fact that the President of Penn State and four other state government officials sit as *ex officio* members of the Board. However, they contend that the remaining 21 members of the Board, nine of whom are selected by Penn State alumni and the remaining 12 of whom are selected by local industrial and agricultural societies are "elected" and that Plaintiffs, as undergraduate students, should be entitled to participate in the election. The Court believes that the manner of each group's selection of members of the Board must be examined separately in order to determine whether it constitutes an appointment or an election for constitutional purposes.

Local agricultural societies select their representatives to the Board of Trustees as follows: In December and January of each year, the University sends to each county agricultural extension director the list of agricultural societies which are eligible to send delegates for the selection of agricultural trustees during the previous commencement week. Each extension director determines whether those societies are still in existence and whether any new societies should be added to the list. A list of agricultural organizations is also submitted by the Secretary of Agriculture. In March, following the return of the approved list of agricultural societies, the University invites each such approved organization to participate in selecting members of

the Board of Trustees. The societies select delegates by volunteering, by appointment or by election. The delegates are informed of the time and place of the upcoming election and, if there are more candidates than available seats on the Board, the delegates cast ballots and elect the requisite number of Board members. The members of the Board representing local industrial societies are selected in an essentially identical manner.

The Court believes that the selection process utilized by the local agricultural and industrial societies does not constitute an election of the general interest as defined in the relevant precedents. Those cases involving disenfranchisement of a selected group in an election of general interest all involve a much more formal and structured election scheme. In Kramer vs. Union Free School District, 395 U.S. 621 (1969) the Court held unconstitutional the election of a local school board by school district voters who, in addition to meeting age and citizenship requirements, either owned or leased taxable real property in the school district, were the spouses of such owners or lessees, or were the parents or guardians of children enrolled for a specified time during the preceding year in a local district school. The Court characterized the legislative enactment which set forth the manner of election as a statute "distributing the franchise" and concluded that such a statute granting the franchise to residents on a selective basis violated the equal protection clause. In Salyer Land Co. vs. Tulare Water District, 410 U.S. 719 (1973), the election in question involved the selection of members of a water storage district where only landowners in the district could vote in the election. Hill vs. Stone, 421 U.S. 289 (1975) involved a provision limiting the right to vote in a city bond election to persons who had listed property for taxation in the Western District near the election. Other cases involving selective

disenfranchisement also involved local bond issues. *See* City of Phoenix vs. Kolodziejski, 399 U.S. 204 (1970) and Cipriano vs. City of Houma, 395 U.S. 701 (1969).

The elections involved in each of those cases shared certain common features. The group from which qualified voters were chosen was an identifiable group of persons from a certain geographical district who were otherwise qualified to vote in a general election. Most of the elections were held at the same time as the general election and simply limited the ability of otherwise qualified voters to cast ballots on certain issues. Finally, in each case where the Court found a constitutional violation, the remedy was apparent, namely that those otherwise qualified voters of the particular district would be permitted to participate in the election from which they had been prohibited.

The Court is of the view that the method utilized by the local industrial and agricultural societies in selecting members of Penn State's Board of Trustees does not fall within the type of election which was at issue in each of the above-cited cases. First, the Court is not convinced that there was any election process at all. Rather, the selection process closely resembles that which was upheld by the Supreme Court in Sailors vs. Board of Education, 387 U.S. 105 (1967). The only difference is that in *Sailors* the bodies which selected the delegates who chose the members of the County School Board were themselves elected by the general public. In this case, the selection process is completely removed from any such public election. The agricultural and industrial societies are private organizations with members who are not elected by the public so that even if they did not choose delegates who in turn selected their representatives on Penn State's Board of Trustees, their selection of such board members would be an appointment

by a private society rather than an election by the general public. Such an appointment is clearly a constitutionally acceptable method of selecting Board members. *See* Sailors vs. Board of Education, 387 U.S. 105 (1967). The persons complaining of "disenfranchisement" in this case, namely undergraduate students at Penn State, do not stand in the same relationship to the members of the agricultural and industrial societies as that of the disenfranchised voters in any of the above cases or to those who were qualified to vote. There is no requirement that members of the agricultural and industrial societies be otherwise qualified to vote in popular elections and they do not represent well-defined voting "districts." Therefore, the Court concludes that the distribution of the franchise as defined by the United States Supreme Court is not involved in this selection scheme and does not reach the questions of whether Penn State's Board of Trustees is a traditional governmental body or whether a compelling interst justifies the distinction made between members of the agricultural and industrial societies and undergraduates of Penn State.

The selection process utilized by Penn State alumni is different from that of the agricultural and industrial societies. No later than February 1 of each year ballots are sent by Penn State to alumni who either have been active members of the alumni association, who have contributed to the university within the past two years or who have specifically requested such a ballot. When the nomination ballots are returned, any nominee receiving 50 or more votes becomes eligible for election as a member of the Board of Trustees. Formal election ballots are mailed to the alumni no later than April 15 and must be returned by a certain date. Approximately 50,000 nomination ballots are mailed out and approximately 14,000 alumni cast election ballots each year.

Although this selection process differs somewhat from that of the agricultural and industrial societies, the Court is not convinced that it involves the kind of distribution of the franchise which the Supreme Court intended to be subject to the strictures of the equal protection clause in its most demanding form. Again, there is no specified geographical district from which the electors must come. No age or residency requirements are imposed. In fact, it is likely that such alumni electors live in various parts of the United States and not just in Pennsylvania. The disenfranchised group, the undergraduate students, does not bear the kind of relationship to the alumni which otherwise qualified members of a particular geographical district bear to electors who are permitted to vote in an election which affects some general interest and which is conducted concurrently with or in the same manner as a general election. Rather, the alumni selection of members of the Board of Trustees is an informal process more akin to the selection of the board members by a private organization than the election of such members by the general public. Therefore, the Court concludes that the undergraduate students' right to vote is not implicated by the decision of Penn State to utilize the above-described methods in selecting its members from among alumni and representatives of local agricultural and industrial societies and the alleged discrimination engaged in by Penn State against the undergraduate students must be judged under a rational basis standard.

The Court is convinced that to reach any other conclusion on this set of facts would be to stretch the voting rights decisions of the United States Supreme Court beyond all recognition. If the Court concluded that Penn State's trustees are selected by a general public election, it would be forced to hold that all interested persons now excluded from the election would be entitled to an equal voice in

the selection of the Board members. Such a holding would extend far beyond the Plaintiffs in this case and could in fact require the election of board members by every qualified voter in the Commonwealth of Pennsylvania, there being no other identifiable geographic area from which voters could be drawn. While the difficulty of a remedy is not the basis of this Court's conclusion that no election is involved in this case, it is one factor to be consideered when construing how far the decisions of the Supreme Court go in extending the equal protection clause to certain types of state action.

The remaining issue in this case is whether a rational basis exists for the distinction which Penn State has drawn between members of local agricultural and industrial societies and its alumni and the undergraduate students at the University. In McGowan vs. Maryland, 366 U.S. 420, 427 (1961), the Court stated that in a situation involving the state's differentiation between certain classes of citizens a violation of the equal protection clause can be made out only "if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." A state does not violate the equal protection clause even if the classification which it has imposed is not the best means to accomplish the underlying state objective and such state action is presumptively valid. *See* Massachusetts Board of Retirement vs. Murgia, 427 U.S. 307, 314-16 (1976) (per curiam).

Penn State was begun as the "Farmer's High School of Pennsylvania" and under the statute providing for the donation of public lands for the benefit of one or more colleges of each state, 7 U.S.C. §§301 et seq., became a land grant college committed to the teaching of agriculture and the mechanic arts.' Therefore, Penn State argues that because

of its historic commitment to both agriculture and industrial goals, it is entitled to give members of agricultural and industrial societies a voice in the operation of the university to the exclusion of other interested groups. The Court cannot say as a matter of law that the distinction made between agricultural and industrial societies and other interested groups, including undergraduate students, is wholly unrelated to the achievement of Penn State's underlying objective which is the governance of the affairs of the University. Therefore, the charter provisions which give local agricultural and industrial societies a voice in selecting members of Penn State's board of trustees but which deny it to undergraduate students do not violate the equal protection clause.

Penn State also suggests that the distinction drawn between alumni and undergraduate students is not wholly irrational. It contends that those alumni who seek election to the Board of Trustees are Penn State graduates who have a continuing interest in the affairs of the University. They argue that an alumnus' undergraduate experience plus his societal standing make him a candidate with knowledge of Penn State's concerns and the ability to make important contributions to the University.

The Plaintiffs contend, however, that because many of the decisions of the Board of Trustees have a substantial impact on the undergraduate students at the University, it is irrational to permit alumni to have a voice in the University's affairs to the exclusion of the undergraduate students even though it would not be irrational, in a non-discriminatory scheme, to permit the alumni to elect trustees. On this point, the Court is not persuaded by Penn State's argument that even though the effect of board action on the lives of the students might be greater than its effect on the lives of alumni, the undergraduate student body as a whole would

not provide candidates for board membership who would be able to maintain the objectivity needed to govern the affairs of Penn State. Penn State suggests that because the Board sets student tuition rates, students might not be impartial when voting on such an issue. Penn State has cited a study in support of its position which suggests that it be advisable that students who serve on college boards of trustees be selected from institutions other than the one whose affairs are governed by that board. Although this Court, were it in a position to pass on the wisdom of Penn State's decision to deny its own students representation on the Board of Trustees, might well conclude that students should be represented and that they would make important contributions to the resolution of such issues as the proper amounts of tuition the precise legal issue before the Court is whether Penn State's decision is wholly irrational or totally unrelated to its objective of governing the University. Penn State has cited the aforesaid study as objective evidence in support of its action and its decisions in this area are presumptively valid. The Court cannot say that it is wholly irrational for Penn State to attempt to choose the members of its Board of Trustees from persons who have a generalized interest in the University's affairs and who would, in Penn State's opinion, be able to maintain their objectivity towards substantially all of the university's actions. Therefore, Penn State's actions do not violate the equal protection clause of the United States Constitution.

The Plaintiffs in this case had originally requested that it be certified as a class action. That request was denied by this Court on September 27, 1977 following a hearing directed to that issue. On December 20, 1977, the Plaintiffs filed a renewed motion for class certification accompanied by a brief and by supporting affidavits. On December 27, 1977 Defendants filed a brief in opposition to that

motion. Plaintiffs filed a reply brief on December 30, 1977. At the pretrial conference in the above-captioned case which was held on January 3, 1978, although neither side desired a hearing on the class action point, it was ordered in accordance with the Court's standard practice that a hearing on the class action issue would be held when the case was reached on the January trial list and it is presently the next case but one on that list. It is this Court's view that certification of a class action is of such importance that the Court should normally see and hear the proposed class representatives in order to determine their fitness to represent the class. However, because the case has now been decided in favor of the Defendants who have opposed class certification, and because the parties have entered into a stipulation which was filed January 17, 1978 indicating that they do not desire that a hearing be held on the class action point, the Court will deny Plaintiffs' renewed motion at this time and will not hold a class certification hearing unless the Plaintiffs request within 4 working days of the date of this Order that one be held.

IV. Conclusions of Law.

1. Penn State's actions in choosing which groups shall have a voice in the selection of members of its Board of Trustees are state action for purposes of 42 U.S.C. §1983 and the Fourteenth Amendment.

2. The process utilized by Penn State in selecting its Trustees is not an election of general interest in which the public participates.

3. Penn State's decision to permit members of local agricultural and industrial societies and University alumni but not undergraduate students to select members of the Board

of Trustees is not totally irrational or wholly unrelated to its objective of governing the University.

4. Penn State's actions do not violate the Equal Protection Clause of the Fourteenth Amendment.

An appropriate order will be entered.

/s/ Muir
MUIR, U.S. District Judge

DATED: January 24, 1978

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DRIANNE BENNER, et al.	:	
Plaintiffs	:	Civil No. 77-351
vs	:	
	:	Complaint Filed 4/29/77
JOHN W. OSWALD, President of The Pennsylvania State University, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

1. The Plaintiffs' renewed motion for the certification of a class is denied without a hearing. Should the Plaintiffs still desire such a hearing, they shall so request within 4 working days of the date of this Order.

2. The Clerk of Court shall enter judgment in favor of the Defendants.

/s/ Muir
Muir, U. S. District Judge

DATED: January 24, 1978

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DRIANNE BENNER, et al,	:	
Plaintiffs	:	CIVIL NO. 77-351
vs	:	
	:	
JOHN W. OSWALD, President of the Pa. State University, et al,	:	Complaint Filed 4/29/77
Defendants	:	(Judge Muir)

JUDGMENT

The issues having been duly reviewed by the Honorable Malcolm Muir, United States District Judge, and a decision having been rendered this date thereon,

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the Defendants and the case be and hereby is dismissed.

Dated at Williamsport, Pennsylvania, this 24th day of January, 1978.

/s/ Donald R. Berry
Donald R. Berry, Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1338

BENNER, DRIANNE; GLAZIER, JEFFREY; SCARANTINO, JAMES; ZIMINSKI, ANNE,

Appellants,

v.

OSWALD, JOHN W., President of PA State University; MILTON J. SHAPP, Governor of the Commonwealth of PA; KENT SHELHAMMER, Secy. of Agriculture of C of PA; CARYL KLINE, Secy. of Education of the C of PA; MAURICE K. GODDARD, Secretary of Environmental Resources, C of PA; HARRY BOYER; HELEN DAVIES; JOSEPH RHODES, Jr.; ROBERT L. RUTTENBERG; DION C. STEWART; WILLIAM K. ULERICH; H. JESSE ARNELLE; MARIAN U. BARASH; WALTER J. CONTI; BARBARA H. FRANKLIN; RALPH HETZEL; KENNETH L. HOLDERMAN; CHARLES W. SHAEFFER; HELEN WISE; J. LIN HUBER; JOHN M. PHILLIPS; JOHN R. PITZER, Jr.; LUTHER SNYDER; HARRY R. ULRICH; J. LEWIS WILLIAMS; H. THOMAS HALLOWELL, Jr.; SAMUEL F. HINKLE; JOHN L. ROMIG; STANLEY G. SCHAFFER; G. ALBERT SHOEMAKER; and QUENTIN E. WOOD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 77-351)

Argued November 13, 1978

Before: ALDISERT and HUNTER, *Circuit Judges* and STEEL, *District Judge.**

(Opinion filed January 24, 1979)

Alan B. Morrison, Esq.
Diane B. Cohn, Esq.
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Thomas B. Schmidt, III, Esq.
10 South Market Square
P.O. Box 1181
Harrisburg, Pennsylvania 17108

Counsel for Appellants

Delbert J. McQuaide, Esq.
R. Mark Faulkner, Esq.
McQuaide, Blasko & Brown, Inc.
811 University Drive
State College, Pennsylvania 16801

Counsel for Appellees

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The question is whether the equal protection clause of the fourteenth amendment requires undergraduate student participation in the election of certain members of the Pennsylvania State University (Penn State) board of trustees. The district court ruled that the students had no such right. They have appealed. Finding no error, we affirm.

* Honorable Edwin D. Steel, Jr., of the United States District Court for the District of Delaware, sitting by designation.

All material facts are set forth in stipulated findings contained in the district court opinion, *Benner v. Oswald,* 444 F. Supp. 545 (M.D. Pa. 1978). The board of trustees is composed of 32 members. Five serve as ex officio members including the president of the University, the state governor and three members of his cabinet. Six other trustees are appointed by the governor with the consent of the senate. The student appellants do not challenge the method by which these eleven trustees are selected, but they do challenge the selection of the remaining 21 trustees. Of this latter group, 9 trustees are elected by the alumni association and 12 are elected by the members of county agricultural and industrial societies of Pennsylvania. Students *qua* students, therefore, do not participate in the election process. They complain that the refusal to allow them to participate in the selection process of these 21 trustees denies them rights guaranteed by the equal protection clause.

They argue preliminarily that the selection process involves state action, thus affording them a procedural vehicle under 42 U.S.C. § 1983 [1] to obtain relief in a federal forum. Substantively, they mount alternative arguments: first, they contend that *Kramer v. Union Free School District,* 395 U.S. 621 (1969), is controlling judicial precedent, requiring appellees to demonstrate that a compelling state interest justifies the trustee selection process. Alternatively, they argue that the selection process cannot pass scrutiny under the less rigorous rational relationship test. The district court agreed with them that requisite state action was present, but held that the proper standard of classification was the rational relationship test, and relying on the *McGowan v. Maryland,* 366 U.S. 420 (1961), formulation that the process would be set aside only if the classi-

1. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

fication is "wholly irrelevant to the achievement of the state's objective," held that the necessary relationship was present.

I.

Alumni trustees are chosen for staggered three-year terms and are elected in a process that begins early in each year when nomination ballots are mailed by the University to alumni who have been active members of the alumni association or who have contributed to the University within the past two years or who specifically request a nomination ballot. Approximately 50,000 nomination ballots are mailed. All nominees receiving 50 or more votes are eligible for the election if they consent. Normally between 8 and 12 nominees vie for the three positions. Election ballots are then mailed to the alumni and approximately 14,000 alumni cast their ballots each year.

Agricultural and industrial trustees, also chosen for staggered three-year terms, are elected by specially chosen delegates during the annual commencement week. The agricultural trustee selection process begins around January when the University sends to all county agricultural extension directors the list of agricultural societies which were eligible to send delegates during the previous year. Each county agricultural extension director determines whether the agricultural societies for his county remain eligible and whether there are new societies to be added to the eligibility list. At the time of the district court hearing there were 397 agricultural societies eligible to send delegates. The industrial trustee selection process is similar. The University determines which industrial societies and associations were eligible to send delegates the previous year. The list is sent to five officials who are responsible for updating the list.[2] At the time of the district

2. The officials are the Secretary of Environmental Resources, the Executive Secretary of the Pennsylvania Society of Professional Engineers, the Secretary of the Pennsylvania Manufacturers' Association, and the Assistant Deans for Continuing Education in the Colleges of Engineering and Earth and Mineral Sciences.

court hearing, 160 mining, manufacturing and engineering societies were eligible to send delegates. Approximately 450 delegates participate annually. In 1977, there were 207 delegates representing agricultural societies, and 198 delegates representing industrial societies.

II.

Our inquiry into state action must begin with a description of the University.

A.

Penn State was created by statute in 1855, 24 P.S. § 2531 *et seq.*, and was originally known as the Farmers' High School of Pennsylvania. The enabling act provided great detail about the purposes of the school and the subjects to be taught: "the English language, grammar, geography, history, mathematics, chemistry and such other branches of the natural and exact sciences as will conduce to the proper education of a farmer." 24 P.S. § 2542. The statute also established the time and place of the first meeting of the trustees, and directed them to obtain a tract of land and to make improvements thereon for "an institution properly adapted to the instruction of youth in the art of farming. . . ." 24 P.S. § 2541. The statute also set the number of original trustees, specified that the governor, the secretary of the commonwealth, the "principal of the institution," and the president of the state agricultural society shall be ex officio members of the board, and designated the nine other trustees by name. 24 P.S. § 2533.

2. (Cont'd.)

The election of trustees by the engineering, mining, manufacturing and mechanical societies and associations is conducted largely through and under the auspices of the Pennsylvania Manufacturers' Association (hereinafter PMA), organized in 1909 as a nonprofit, unincorporated association having as its purpose the promotion of "the welfare of its members and the economic prosperity of the Commonwealth of Pennsylvania and its manufacturing and service industries." The PMA is a broadbased organization with over five thousand (5000) dues paying members, comprised of individual members, organizational members, and trade association members in Pennsylvania. It has local chapters and appointed secretaries in 41 counties of the 67 in the Commonwealth of Pennsylvania. In addition, PMA maintains liaison with autonomous manufacturing associations located in 13 counties.

Successors to the original designated trustees were to be elected annually by delegates of each county agricultural society in the commonwealth. 24 P.S. § 2535.

The institution broadened somewhat in 1862 when Congress passed the Morrill Act, which established land grant colleges. 7 U.S.C. § 301 *et seq.* Under the Act, Congress provided land and other assistance for state universities that taught both agriculture and mechanical arts, provided that the state agreed to accept the terms and conditions of the congressional mandate. The commonwealth agreed to those conditions by necessary legislation and expanded the size of the board of trustees by subsequent legislation. Annually, trustees adopt the operating budget and determine the level of tuition to be paid by students in the next academic year. The level of tuition is based on estimates of expense and of income from other sources, including the estimated amount of the state appropriation, endowment income, recovery of indirect costs on government contracts and other miscellaneous sources. The commonwealth provides an annual appropriation to the University, representing over 30% of the total revenues received.[3] In addition it makes grants for special projects; students have received substantial scholarship aid from Pennsylvania ranging from $6 million to $9 million annually from 1971 through 1976.

In addition, the Pennsylvania General State Authority (GSA) has provided physical facilities to the University for many years. Since 1968 the GSA has constructed on the campuses of the University educational buildings valued at approximately 95 million dollars. These improvements were made pursuant to statute, 71 Pa. C.S. § 7107.4.

3. The parties stipulated that in the last five fiscal years for which figures were available the amounts appropriated, and the percentage of total revenues these amounts represent, were as follows:

	1971-72	1972-73	1973-74
Amount Appropriated	$76,200,000	$82,694,000	$87,106,895
% of Total Revenues	34.9%	33.8%	33.5%
	1974-75	1975-76	
Amount Appropriated	$94,087,520	$102,685,610	
% of Total Revenues	32.4%	31.2%	

The GSA holds legal title to these buildings and to the land upon which they are constructed. In every instance, the University has conveyed title to the land by general warranty deed, and utilizes the GSA buildings in its educational functions and for no other purpose.

University employees may be members of the State Employees' Retirement System, 71 Pa. C.S. § 5101 *et seq.*; the University pays its employer's contribution into the retirement system fund from its general operating revenues. Roads on University campuses may be constructed by the Pennsylvania Department of Transportation, 36 P.S. § 670-601.

B.

Appellees would have us affirm the judgment of the district court without addressing the merits of the constitutional issues. They would have us do this, albeit for reasoning inconsistent with that of the trial court, *Rhoads v. Ford Motor Co.*, 514 F.2d 931, 934 (3d Cir. 1975), by holding that the actions and selection of the board of trustees do not amount to state action for purposes of the equal protection clause. They contend that although Pennsylvania supplies funds for the operation of the University, no members of either the executive or the legislative branches of the commonwealth participate officially in the selection process of the board. They argue that other than the ex officio trustees and the trustees appointed by the governor, no state officers participate in formulating essential University policy. Accordingly, they urge us to conclude that the requisite connection between the commonwealth and the University is not present. We disagree and determine that there is sufficient state involvement to constitute state action within the meaning of 42 U.S.C. § 1983.

Significant decisions of this court and in this circuit compel this conclusion. In *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328 (3d Cir. 1975), we analyzed the considerations necessary to determine whether the conduct

of a private entity falls within the rubric of state action. We said:

> Any discussion of the "protean concept" of state action must begin with the *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). It was there the Supreme Court first enunciated the principle that "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment"; only "state action of a particular character . . . is prohibited." *Ibid.* at 11, 3 S. Ct. at 21.
>
> Notwithstanding the *Civil Rights Cases*, subsequent decisions of the Supreme Court have pierced the seemingly impenetrable veil of private, individual conduct to find state action. These cases have the capability of being grouped into three general categories: (1) where state courts enforced an agreement affecting private parties; (2) where the state "significantly" involved itself with the private party; and (3) where there was private performance of a government function.

516 F.2d at 1331 (footnotes omitted). In *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976), we made certain observations which are especially applicable here:

> [T]he polestar of our analysis must be whether the state involvement in the challenged action of the [University] is "significant", *see Reitman v. Mulkey*, 387 U.S. 369, 378, 380, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), that is, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1974), citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972), *or* whether the "State has so far insinuated itself into a position of interdependence with [the University] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961).
>
> A nexus test is necessarily one of degree. As we observed in *Magill*, the Supreme Court has not fashioned "any definitive state action formula"; rather, the Court "admits to extreme difficulty in articulating an all-inclusive test and seems to emphasize that, within the confines of certain guidelines, the presence or absence of state action must be determined on a case-by-case basis." 516 F.2d at 1332 (footnotes omitted).

545 F.2d at 383 (emphasis added).

It is significant that *Hollenbaugh* expressed the test in the disjunctive: state action could be found by examining the challenged activity under *either* the *Jackson* rule, *or* the *Burton* rule.

In *Chalfant v. Wilmington Institute*, 574 F.2d 739, 744 (3d Cir. 1978) (in banc), we dispelled any possible uncertainties in this respect and put to rest the very argument relied upon by the appellees in these proceedings:

> In *Braden v. University of Pittsburgh*, 552 F.2d 948, 957 (3d Cir. 1977) (en banc), we reiterated the *Hollenbaugh* holding that *Jackson* had not substituted a single nexus test for an ad hoc analysis of the facts and circumstances of each case as it arises. *Braden* also recognized explicitly that *Jackson* did not overrule *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). In dealing with *Burton*, Judge Adams, writing for this court in *Braden* observed:
>
> > Speaking for a unanimous panel [in *Hollenbaugh v. Carnegie Free Library*], Judge Aldisert de-

> clared: "The state's extensive participation in the comprehensive program may obviate a need to show involvement in the specific activity challenged [as] is illustrated by *Burton* . . . ."

552 F.2d at 958 n.45. Thus, the law in this circuit is clear. The *Jackson* nexus test, whatever it means in the context of the activities of what the Supreme Court considers to be private enterprises, cannot be applied mechanically in other contexts. We have expressly rejected the application of the *Jackson* test, which was enunciated within the context of a private enterprise electric utility, to the analysis of state action in a public library, a university, or any other public educational institution. *Hollenbaugh* and *Braden* hold that the status of the individual actor is irrelevant if the institution on whose behalf he acted is found, upon an examination of all the relevant factors, to be an instrumentality of a state or local government.

574 F.2d at 744-75 (footnotes omitted).

We therefore conclude that the district court properly analyzed and applied the teachings of this court by determining that state action could be found, either (1) when the state and the entity whose activities were challenged are joint participants in a symbiotic relationship or (2) where the entity is pervasively regulated by the state and a sufficient nexus exists between the state and the challenged activity. "If the former situation is found to exist, all of the entity's actions are state actions and a nexus between any state regulation and the action need not be shown." 444 F. Supp. at 556. We specifically adopt the following observations and determinations of Judge Muir, the trial judge:

> The parties' undisputed findings of fact indicate that the Governor of Pennsylvania, the Secretary of Education, the Secretary of Agriculture, and the Secretary of Environmental Resources are all ex officio members

of the Board of Trustees. Six other members out of a total membership of 32 on that Board are appointed by the Governor. Penn State is obligated to teach, among other subjects, both agriculture and mechanical arts by virtue of its agreement with the Commonwealth. The Commonwealth is committed to an annual appropriation to Penn State and has made such appropriations since 1863. The sums of money appropriated to Penn State by the Commonwealth have constituted 34.5%, 33.8%, 33.5%, 32.4% and 31.2% of Penn State's total revenues for fiscal years 1971-72, 1972-73, 1973-74, 1974-75, and 1975-76, respectively. The General State Authority, an agency of the Commonwealth, is authorized to construct physical facilities on Penn State's campus and has in fact constructed over $95,000,000 of such facilities since 1968. The General State Authority owns all such buildings which are situated on the Penn State campus. Penn State's employees may participate in the state employee's retirement system and the University pays contributions to that system. The Pennsylvania Department of Transportation is authorized to construct roads on the Penn State campus. In addition to those undisputed facts, the Court takes judicial notice of the opinions of the Pennsylvania Attorney General which have held that Penn State is a state institution for purposes of exemption from the gasoline tax, the Pennsylvania inheritance tax laws, and the Capital Stock Tax, . . . and that the annual appropriations acts impose auditing restrictions on Penn State . . . . The Court believes it is unquestionable that from the foregoing facts the Commonwealth has direct participation in determining at least some of the members of the Board of Trustees, that the Commonwealth does review Penn State's expenditure of Commonwealth funds, that the legislature intended Penn State to be a state educational institution, that the Attorney General of

> Pennsylvania has consistently regarded Penn State as such an institution, that Penn State partakes of benefits available for its capital development, that it relies exclusively upon the general state authority for such development, and that Penn State is substantially dependent on Commonwealth subsidies. Therefore, the requisite amount of "significant involvement" by the Commonwealth in Penn State's affairs is present and, under *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), Penn State's actions are "state actions."

Benner v. Oswald, 444 F. Supp. 545, 557-58 (M.D. Pa. 1978).

Accordingly, we agree with the district court that the stipulated record here demonstrates state action. Our determination is in accordance with the pioneer decision in this field authored by our brother Higginbotham (then a district judge) in *Isaacs v. Board of Trustees of Temple University*, 385 F. Supp. 473 (E.D. Pa. 1974).[4]

III.

We turn now to the constitutional arguments advanced by the student appellants. At the beginning of the 1960's judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases.[5] In recent years the concept has been given broad judicial expansion in matters affecting criminal trials, interstate travel, alienage, and a host of other social, economic and political interests including voting. In all equal protection cases some classification has occurred, but the standard of judicial scrutiny is usually dependent upon the subject matter of the classification. In some cases the classification itself is deemed suspect.[6] In others, while the classification is not suspect, the individual right affected is denominated as fundamental. For example, voting in a governmental election is considered a fundamental right. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Kramer v. Union Free School District*, 395 U.S. 621 (1969). *See also Roe v. Wade*, 410 U.S. 113 (1973) (right of a uniquely private nature); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (1968) (rights guaranteed by the first amendment); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate). If the case involves a fundamental right or a suspect classification, the state activity will be subject to strict judicial scrutiny and will prevail only if the state shows that such action is justified by a "compelling state interest." *American Party of Texas v. White*, 415 U.S. 767, 780 (1974).

On the other hand, state regulations bearing upon rights and classifications not so denominated are subject to a relatively relaxed standard of judicial scrutiny, and will pass muster if the purpose of the classification bears some rational relationship to a legitimate state purpose.[7] *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). As the Supreme Court has recently stated: " 'The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a par-

4. *See also Klain v. Pennsylvania State Univ.*, 434 F. Supp. 571 (M.D. Pa. 1977).

5. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

6. *E.g., Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry).

7. Although familiarly known as the two-tier test, the Supreme Court has recognized another test, not applicable here, for gender cases. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977) (plurality opinion), quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976). Justice Marshall suggests that the Court applies a more sophisticated test in equal protection cases. "The substantiality of the interests we have required a State to demonstrate in support of a challenged classification has varied with the character of the classification and the importance of the individual interests at stake." *Hollenbaugh v. Carnegie Free Library*, — U.S. —, 47 U.S.L.W. 3406 (December 11, 1978) (opinion sur denial of petition for certiorari, Marshall, J.).

ticular geographical or political subdivision of the state.' . . . Rather, the Equal Protection Clause is offended only if the statute's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective.' . . . ." *Holt Civic Club v. Tuscaloosa*, — U.S. —, 47 U.S.L.W. 4008, 4011 (November 28, 1978) (citations omitted). The rational basis standard presumes such legislative action to be valid. It reflects the courts' awareness that the drawing of lines which create distinct classifications is peculiarly a legislative task and an unavoidable one. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

The student appellants advance two arguments in their constitutional attack on the trustee selection process. Primarily, they contend they are being denied a fundamental right to vote and the selection process must therefore be scrutinized under the compelling state interest test. In this regard, the students assert that the teachings of *Kramer v. Union School District*, 395 U.S. 621 (1969), and similar cases should control the disposition of this case. Alternatively they urge that even if we examine the selection process under the less stringent rational basis test we should find it constitutionally defective.

A.

We must first determine which test to employ in our analysis. The students assert that a right to vote for trustees of a university is equivalent to a right to vote for elected members of local, state and federal government. They suggest that their individual interest denied by the University's method of selecting trustees is equivalent to the denial of an individual's right to vote in public elections.[8]

In *Kramer, supra*, at issue was a New York statute that limited the right to vote in local school board elections to persons, otherwise eligible to vote in general elections,

8. No contention of a suspect classification has been advanced.

who owned or leased taxable real property in the school district or who had children enrolled in public school in the particular district. The Court held that in an election of general interest, voting restrictions other than those pertaining to residence, age and citizenship must promote a compelling state interest in order to be constitutional. Because the New York statute in question did not accomplish the articulated state goal with sufficient precision, it was struck down as a denial of equal protection. 395 U.S. at 632.

Likewise, in *Hadley v. Junior College District of Kansas City*, 397 U.S. 50 (1970), certain residents and taxpayers of the Kansas City school district, one of eight school districts which made up the junior college district of metropolitan Kansas City, mounted a constitutional assault on the Missouri statute that apportioned their right to vote for the trustees who conducted and managed the affairs of the junior college district. The statute provided for the election of six trustees and for the apportionment to be made on the basis of the number of school age children who reside in each district. The Kansas City school district contained approximately 60% of the total number of school age children in the junior college district but was apportioned only 50% of the total number of trustees. In holding that the right to vote for trustees had been unconstitutionally diluted, the Court determined that "as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . ." *Id.* at 56.

Examining these teachings we note that the cases involve general government elections. Such elections are seen as directly relating to the Constitution: "statutes distributing the franchise constitute the foundation of our representative society." *Kramer, supra*, 395 U.S. at 626.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 553 at 555 (1964) (footnote omitted). "Like *Skinner v. Oklahoma*, . . . such a case 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' . . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise one's vote in an unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370." *Id.*, 377 U.S. at 561-62.

But we refuse to accept the formulation of the student appellants that the right to vote for a university trustee is equivalent to a right to vote in a participatory democracy. We will not conclude that the University trustee selection process is a general public election, or that the trustees perform general governmental functions. The University's board of trustees controls no viable political sub-division and has less power than a local school district. It cannot acquire property by condemnation, levy or collect taxes, or pass on petitions to annex school districts. It simply does not possess the minimum governmental powers associated with municipal, school district, county, state, or federal offices. At most, the board has the authority to approve a budget and set a level of tuition. And even in the setting of tuition, they do not have a free hand. The parties have stipulated that "[t]he level of tuition is based upon esti-

mates of expense and of income from other sources, including the estimated amount of the state appropriation, endowment income, recovery of indirect costs on government contracts and other miscellaneous sources." 444 F. Supp. at 555.

With regard to the students' contention, we are mindful of Justice Holmes' observation in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908):

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.

Paraphrasing the Supreme Court's latest decision in this field which made a reference to Holmes's statement, "The line heretofore marked by [the Supreme] Court's voting qualifications decisions coincides with the [public and political nature] of the governmental unit at issue, and we hold that appellants' case . . . falls on the farther side." *Holt Civic Club Inc. v. Tuscaloosa, supra*, 47 U.S.L.W. at 4011.

We therefore conclude that the duties of the trustees are not commensurate with the duties of elected public officials; that these duties do not involve the responsibilities going to "the essence of a democratic society," and do not implicate decisions that are "preservative of all rights." Because the trustees' duties do not approach the quantum of responsibilities of officials selected in a political democracy, we conclude that any individual interests affected by the selection process classifications are not fundamental

rights so as to require recourse to the strict judicial scrutiny standard.

B.

Our remaining task is to decide whether any rational basis exists to support the distinction which limits participation in the trustee selection process to members of local agricultural and industrial societies and alumni.

The University originated as the Farmer's High School of Pennsylvania and under the federal statute providing the donation of public lands, it became a land grant college committed to the teaching of agriculture and the mechanic arts.[9] We agree with Judge Muir's determination:

> Penn State argues that because of its historic commitment to both agriculture and industrial goals, it is entitled to give members of agricultural and industrial societies a voice in the operation of the university to the exclusion of other interested groups. The Court cannot say as a matter of law that the distinction made between agricultural and industrial societies and other interested groups, including undergraduate students, is wholly unrelated to the achievement of Penn State's underlying objective which is the governance of the affairs of the University. Therefore the charter provisions which give local agricultural and industrial societies a voice in selecting members of Penn State's board of trustees but which deny it to undergraduate students do not violate the equal protection clause.

414 F. Supp. at 561-62.

Allowing alumni to participate in the selection process is justified by the premise that those alumni who cast

9. *See* 7 U.S.C. § 304 for the Land Grant Act and 24 P.S. § 2575 for Pennsylvania's acceptance of it. *See also* 24 P.S. §§ 2578-79, 2581-84 for Pennsylvania's response to similar legislation granting benefits to and supporting programs at colleges for the agricultural and mechanic arts. The University has been designated by the state legislature as the recipient institution.

ballots are graduates of the University who have a continuing interest in its affairs. Alumni support of their *alma mater* is a universal phenomenon in the United States and alumni provide an important source of political, social, and financial sustenance. The record here reveals that for the period 1953 through 1977 alumni have contributed the sum of $11,247,076 through lifetime gifts or testamentary bequests. An alumni association has been active at Penn State for over 100 years, and the record demonstrates significant participation in University activities.

Applying the rational basis test, we cannot conclude that the trustee selection process which limits participation to alumni and agricultural and industrial groups is irrational. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

Because we affirm the judgment in favor of the appellees, and because this was a case stated in the district court, appellants' contention relating to class action determination is moot.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1338

BENNER, DRIANNE; GLAZIER, JEFFREY; SCARANTINO, JAMES; ZIMINSKI, ANNE; CHARLES J. ZITO,

Appellants

vs.

OSWALD, JOHN W., President of PA State University; MILTON J. SHAPP, Governor of the Commonwealth of PA; KENT SHELHAMMER, Secy. of Agriculture of C of PA; CARYL KLINE, Secy. of Education of the C of PA; MAURICE K. GODDARD, Secretary of Environmental Resources, C of PA; HARRY BOYER; HELEN DAVIES; JOSEPH RHODES, Jr.; ROBERT L. RUTTENBERG; DION C. STEWART; WILLIAM K. ULERICH; H. JESSE ARNELLE; MARIAN U. BARASH; WALTER J. CONTI; BARBARA H. FRANKLIN; RALPH HETZEL; KENNETH L. HOLDERMAN; CHARLES W. SHAEFFER; HELEN WISE; J. LIN HUBER; JOHN M. PHILLIPS; JOHN R. PITZER, Jr.; LUTHER SNYDER; HARRY R. ULRICH; J. LEWIS WILLIAMS; H. THOMAS HALLOWELL, Jr.; SAMUEL F. HINKLE; JOHN L. ROMIG; STANLEY G. SCHAFFER; G. ALBERT SHOEMAKER; and QUENTIN E. WOOD

(D. C. Civil No. 77-351)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ALDISERT and HUNTER, *Circuit Judges* and STEEL, *District Judge.**

*Honorable Edwin D. Steel, Jr., of the United States District Court for the District of Delaware, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on November 13, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered January 24, 1978, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn

CLERK

January 24, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

– – –

No. 78-1338

– – –

BENNER, DRIANNE; GLAZIER, JEFFREY; SCARANTINO, JAMES; ZIMINSKI, ANNE,

Appellants,

v.

OSWALD, JOHN W., President of PA State University; MILTON J. SHAPP, Governor of the Commonwealth of PA; KENT SHELHAMMER, Secy. of Education of the C of PA; CARYL KLINE, Secy. of Education of the C of PA; MAURICE K. GODDARD, Secretary of Environmental Resources, C of PA; HARRY BOYER; HELEN DAVIES; JOSEPH RHODES, Jr.; ROBERT L. RUTTENBERG; DION C. STEWART; WILLIAM K. ULERICH; H. JESSE ARNELLE; MARIAN U. BARASH; WALTER J. CONTI; BARBARA H. FRANKLIN; RALPH HETZEL; KENNETH L. HOLDERMAN; CHARLES W. SHAEFFER; HELEN WISE; J. LIN HUBER; JOHN M. PHILLIPS; JOHN R. PITZER, Jr.; LUTHER SNYDER; HARRY R. ULRICH; J. LEWIS WILLIAMS; H. THOMAS HALLOWELL, Jr.; SAMUEL F. HINKLE; JOHN L. ROMIG; STANLEY G. SCHAFFER; G. ALBERT SHOEMAKER; and QUENTIN E. WOOD

– – –

SUR PETITION FOR PANEL REHEARING

Present: ALDISERT and HUNTER, *Circuit Judges*, and STEEL, *District Judge*.

The petition filed by Drianne Benner, et al., appellants, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for

rehearing, the petition for rehearing before the original panel is denied.

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: February 15, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1338

BENNER, DRIANNE; GLAZIER, JEFFREY; SCARANTINO, JAMES; ZIMINSKI, ANNE,

Appellants,

v.

OSWALD, JOHN W., President of PA State University; MILTON J. SHAPP, Governor of the Commonwealth of PA; KENT SHELHAMMER, Secy. of Agriculture of C of PA; CARYL KLINE, Secy. of Education of the C of PA; MAURICE K. GODDARD, Secretary of Environmental Resources, C of PA; HARRY BOYER; HELEN DAVIES; JOSEPH RHODES, Jr.; ROBERT L. RUTTENBERG; DION C. STEWART; WILLIAM K. ULERICH; H. JESSE ARNELLE; MARIAN U. BARASH; WALTER J. CONTI; BARBARA H. FRANKLIN; RALPH HETZEL; KENNETH L. HOLDERMAN; CHARLES W. SHAEFFER; HELEN WISE; J. LIN HUBER; JOHN M. PHILLIPS; JOHN R. PITZER, Jr.; LUTHER SNYDER; HARRY R. ULRICH; J. LEWIS WILLIAMS; H. THOMAS HALLOWELL, Jr.; SAMUEL F. HINKLE; JOHN L. ROMIG; STANLEY G. SCHAFFER; G. ALBERT SHOEMAKER; and QUENTIN E. WOOD

Present: ALDISERT and HUNTER, *Circuit Judges*, and STEEL, *District Judge*.*

ORDER

Appellants' motion to add Charles J. Zito as plaintiff-appellant was referred to this panel in June, 1978. After due consideration of the motion, it is ORDERED that

*Honorable Edwin D. Steel, Jr., of the United States District Court for the District of Delaware, sitting by designation.

Charles J. Zito is added as a plaintiff-appellant in the within case nunc pro tunc.

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: March 6, 1969

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1338

BENNER, DRAINNE; GLAZIER, JEFFREY; SCARANTINO, JAMES; ZIMINSKI, ANNE,

Appellants,

vs.

OSWALD, JOHN W., President of PA State University; MILTON J. SHAPP, Governor of the Commonwealth of PA; KENT SHELHAMMER, Secy. of Agriculture of C of PA; CARYL KLINE, Secy. of Education of the C of PA; MAURICE K. GODDARD, Secretary of Environmental Resources, C of PA; HARRY BOYER; HELEN DAVIES; JOSEPH RHODES, Jr.; ROBERT L. RUTTENBERG; DION C. STEWART; WILLIAM K. ULERICH; H. JESSE ARNELLE; MARIAN U. BARASH; WALTER J. CONTI; BARBARA H. FRANKLIN; RALPH HETZEL; KENNETH L. HOLDERMAN; CHARLES W. SHAEFFER; HELEN WISE; J. LIN HUBER; JOHN M. PHILLIPS; JOHN R. PITZER, Jr.; LUTHER SNYDER; HARRY R. ULRICH; J. LEWIS WILLIAMS; H. THOMAS HALLOWELL Jr.; SAMUEL F. HINKLE; JOHN L. ROMIG; STANLEY G. SCHAFFER; G. ALBERT SHOEMAKER; and QUENTIN E. WOOD

(D. C. Civil No. 77-351)

It appearing that this Court has by order of this date granted appellants' motion to add Charles J. Zito as plaintiff-appellant in the above-entitled case, and it further appearing that the certified judgment in lieu of formal mandate issued herein on February 23, 1979,

It is O R D E R E D that the said certified judgment be and the same is hereby recalled for the purpose of filing the aforesaid order amending the caption of this case;

It is FURTHER O R D E R E D that on the filing of the aforesaid order the certified judgment in lieu of formal mandate in this case shall reissue forthwith.

For the Court,

/s/ Thomas F. Quinn
Clerk

Dated: March 6, 1979

Supreme Court, U. S.
FILED
JUN 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1722

DRIANNE BENNER, JEFFREY GLAZIER, JAMES SCARANTINO, ANNE ZIMINSKY AND CHARLES J. ZITO,

Petitioners,

v.

JOHN W. OSWALD, MILTON H. SHAPP, KENT SHELHAMMER, CARYL KLINE, MAURICE K. GODDARD, HARRY BOYER, HELEN DAVIES, JOSEPH RHODES, JR., ROBERT L. RUTTENBERG, DION C. STEWART, WILLIAM K. ULERICH, H. JESSE ARNELLE, MARIAN U. BARASH, WALTER J. CONTI, BARBARA H. FRANKLIN, RALPH HETZEL, KENNETH L. HOLDERMAN, CHARLES W. SHAEFFER, HELEN WISE, J. LIN HUBER, JOHN M. PHILLIPS, JOHN R. PITZER, JR., LUTHER SNYDER, HARRY R. ULRICH, J. LEWIS WILLIAMS, H. THOMAS HALLOWELL, JR., SAMUEL F. HINKLE, JOHN L. ROMIG, STANLEY G. SCHAFFER, G. ALBERT SHOEMAKER, AND QUENTIN E. WOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

J. Thomas Menaker
McNEES, WALLACE & NURICK
100 Pine Street
P.O. Box 1166
Harrisburg, Pennsylvania 17108

Delbert J. McQuaide
R. Mark Faulkner
McQUAIDE, BLASKO & BROWN, Inc.
811 University Drive
State College, Pennsylvania 16801

Attorneys for Respondents

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF CONTENTS

Page

QUESTION PRESENTED

WHETHER STUDENTS ENROLLED AT THE PENNSYLVANIA STATE UNIVERSITY HAVE A RIGHT TO VOTE, GUARANTEED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, FOR THE MEMBERS OF THE BOARD OF TRUSTEES OF THE UNIVERSITY? 2

A. Statement of Facts 2

B. Proceedings Below 4

REASONS FOR DENYING THE WRIT

THE DECISION OF THE THIRD CIRCUIT IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS 7

THE DECISION OF THE THIRD CIRCUIT TURNS ON ITS OWN PARTICULAR FACTS AND IS NOT OF IMPORTANCE BEYOND THE INTERESTS OF THE LITIGANTS? 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases:

American Party of Texas v. White,
415 U.S. 767 (1974) 8, 9

Burton v. Wilmington Parking Authority,
365 U.S. 715 (1961) 8

Baker v. Regional High School District No. 5,
520 F.2d 799, 801-802 (2nd Cir. 1975) 9, 10

Civil Rights Cases,
109 U.S. 3 (1883) 8

Dundee v. Orleans Board of Parish Supervisors,
434 F.2d 135, 139 (5th Cir. 1970) 9, 10

Holt Civil Club v. City of Tuscaloosa,
___ U.S. ___ 99 S.Ct. 383 (1978) 9

Kramer v. Union Free School District,
395 U.S. 621 (1969) 4, 9

Salyer Land Co. v. Tulare Lake Water Basin Storage Dist.,
410 U.S. 719 12

Sailors v. Board of Education,
387 U.S. 105 (1967) 4

Statute:

Act of 1862, 12 Stat. 503, 7 U.S.C.
§§ 301 *et seq.* 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1722

DRIANNE BENNER, JEFFREY GLAZIER, JAMES SCARANTINO, ANNE ZIMINSKY AND CHARLES J. ZITO,

Petitioners,

v.

JOHN W. OSWALD, MILTON H. SHAPP, KENT SHELHAMMER, CARYL KLINE, MAURICE K. GODDARD, HARRY BOYER, HELEN DAVIES, JOSEPH RHODES, JR., ROBERT L. RUTTENBERG, DION C. STEWART, WILLIAM K. ULERICH, H. JESSE ARNELLE, MARIAN U. BARASH, WALTER J. CONTI, BARBARA H. FRANKLIN, RALPH HETZEL, KENNETH L. HOLDERMAN, CHARLES W. SHAEFFER, HELEN WISE, J. LIN HUBER, JOHN M. PHILLIPS, JOHN R. PITZER, JR., LUTHER SNYDER, HARRY R. ULRICH, J. LEWIS WILLIAMS, H. THOMAS HALLOWELL, JR., SAMUEL F. HINKLE, JOHN L. ROMIG, STANLEY G. SCHAFFER, G. ALBERT SHOEMAKER, AND QUENTIN E. WOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, John W. Oswald, et al., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 592 F.2d 174.

QUESTION PRESENTED

WHETHER STUDENTS ENROLLED AT THE PENNSYLVANIA STATE UNIVERSITY HAVE A RIGHT TO VOTE, GUARANTEED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, FOR THE MEMBERS OF THE BOARD OF TRUSTEES OF THE UNIVERSITY?

A. Statement of Facts.

The Pennsylvania State University (originally the Farmers High School of Pennsylvania) was granted a private nonprofit corporate charter in 1855, by special Act of the legislature. (App. A, p. 4, ¶15).[1] Special Acts of the legislature were the common method of creating corporations at that time. Although the Governor and the Secretary of the Commonwealth were charter members of the board of trustees, the majority of the board consisted of private individuals. The charter provided for the perpetuation of the board by election of private individuals by the private agricultural societies of the counties and of the Pennsylvania State Agricultural Society, a private organization.

There have been numerous amendments to the corporate charter changing the number of trustees and the manner of their selection. These amendments were adopted by the board of trustees and approved by the Court of Common Pleas of Centre County, Pennsylvania, in conformance with the applicable state nonprofit corporate laws applicable to private corporations in effect from time to time. (App. A, p. 5, ¶18.)

[1] References designated by "App.___" are to the Appendices to the petition for writ, said references to ¶ are to the numbered stipulations for the parties which were incorporated in the opinion of the district court.

On March 13, 1867, the board of trustees accepted the benefits of the federal land grant act, Act of 1862, ch. 130, 12 Stat. 503, 7 U.S.C. §§ 301, et seq., after the legislature had designated the University to be the recipient of the benefits of the act. (App. A, p. 4, ¶16.) By reason of this designation, the Commonwealth pledged its support to the University and, over the years, has provided substantial financial support to the University.

Because of this substantial financial support, the board of trustees has amended the corporate charter several times to provide for public representation on the board. However, the public representation has always been in the minority.

The present charter provides that the board shall consist of five ex-officio members (the Governor, Secretary of Education, Secretary of Agriculture, Secretary of Environmental Resources and the President of the University); six members appointed by the Governor; nine members selected by the General Alumni Association; six members selected by delegates representing county agricultural societies in the state; and six members selected by delegates representing county engineering, mining, manufacturing and mechanical societies in the state (hereinafter called "Industrial Societies"). (App. A, p. 5, ¶19.)

The selection process for board membership, mandated by the corporate charter, authorizes members of private organizations, i.e. the agricultural and industrial societies in Pennsylvania, to annually select delegates who in turn annually convene to vote for members of the board. The selection process also authorizes members of the General Alumni Association, a nonprofit corporation, to annually cast mail ballots for members of the board. (App. A., pp. 11-19, ¶¶55-97.)

The corporate charter does not expressly deny to students, or any other class of persons, the right to vote for trustees; rather, it provides for participation in the selection process as described above.

The corporation does not exercise governmental powers. It has no right to acquire property by eminent domain, to levey or collect taxes, to exercise governmental functions in a geographic area or to conduct a public election. The corporate charter states the powers of the corporation as follows:

> " * * * and the said corporation shall, by the same name, have power to sue and be sued, and generally to do and transact all and every business touching or concerning the premises, or which shall be necessarily incidental thereto, and to hold, enjoy, and exercise all such powers, authorities, and jurisdiction as are customary within the colleges within this Commonwealth." (App. A, p. 5, ¶20; Exhibit D1.)

B. Proceedings Below.

Relying on *Sailors v. Board of Education*, 387 U.S. 105 (1967), the District Court concluded that the selection process for membership on the board is not a governmental election within the meaning of *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and its progeny.

The Third Circuit agreed on this issue, and, in addition, concluded:

> "But we refuse to accept the formulation of the student appellants that the right to vote for a university trustee is equivalent to a right to vote in a participatory democracy. We will not conclude that the University trustee selection process is a general public election, or that the trustees perform general governmental functions. The University's board of trustees controls no viable political sub-division and has less power than a local school district. It cannot acquire property by condemnation, levy or collect taxes, or pass on petitions to annex school districts. It simply does not possess the minimum governmental powers associated with municipal, school district, county, state, or federal offices." 592 F.2d at 183.
>
> * * *
>
> "We therefore conclude that the duties of the trustees are not commensurate with the duties of elected public officials; that these duties do not involve the responsibilities going to 'the essence of a democratic society,' and do not implicate decisions that are 'preservative of all rights.' Because the trustees' duties do not approach the quantum of responsibilities of officials selected in a political democracy, we conclude that any individual interests affected by the selection process classifications are not fundamental rights so as to require recourse to the strict judicial scrutiny standard." 592 F.2d 183. (App. B, p. 16-17.)

The Third Circuit then applied the "rational basis test" to the selection process, stating:

> "Our remaining task is to decide whether any rational basis exists to support the distinction which limits participation in the trustee selection process to members of local agricultural and industrial societies and alumni.

"The University originated as the Farmer's High School of Pennsylvania and under the federal statute providing the donation of public lands, it became a land grant college committed to the teaching of agriculture and the mechanic arts. We agree with Judge Muir's determination:

> 'Penn State argues that because of its historic commitment to both agriculture and industrial goals, it is entitled to give members of agricultural and industrial societies a voice in the operation of the university to the exclusion of other interested groups. The Court cannot say as a matter of law that the distinction made between agricultural and industrial societies and other interested groups, including under-graduate students, is wholly unrelated to the achievement of Penn State's underlying objective which is the governance of the affairs of the University. Therefore the charter provisions which give local agricultural and industrial societies a voice in selecting members of Penn State's board of trustees but which deny it to undergraduate students do not violate the equal protection clause.

"414 F. Supp. at 561-62.

"Allowing alumni to participate in the selection process is justified by the premises that those alumni who cast ballots are graduates of the University who have a continuing interest in its affairs. Alumni support of their *alma mater* is a universal phenomenon in the United States and alumni provide an important source of political, social, and financial sustenance. The record here

> reveals that for the period 1953 through 1977 alumni have contributed the sum of $11,247,076 through lifetime gifts or testamentary bequests. An alumni association has been active at Penn State for over 100 years, and the record demonstrates significant participation in University activities.
>
> "Applying the rational basis test, we cannot conclude that the trustee selection process which limits participation to alumni and agricultural and industrial groups is irrational. 'A statutory discrimination will not be set aside if any state of facts reasonbly may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 (1962)." 592 F.2d 183-184. (App. B, p. 18-19.)

The Third Circuit affirmed the judgment of the District Court in favor of the respondents.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE THIRD CIRCUIT IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

1. Petitioners assert that the Third Circuit "broke new ground by applying the rational basis test to classifications established not by democratically elected state legislatures, but by the very body whose legitimacy was being challenged." Petitioners describe the selection process of the corporate charter as "a privately created classification" and argue that, consequently, the strict scrutiny test must be applied because the classification was not created by the democratic electoral process.

This argument, raised for the first time in this case, is novel, but logically flawed. No decision of this Court holds that the determination of the applicable equal protection test (rational basis or strict scrutiny) rests upon whether the classification was privately created or created by the democratic electoral process. Indeed, the application of either test is necessarily predicated upon the existence of state action. *Civil Rights Cases*, 109 U.S. 3 (1883). The existence of state action in this case, if it is present at all, necessarily rests upon a symbiotic relationship between a private nonprofit corporation and the state. *Burton v. Wilmington Parking Authority*, 365, U.S. 715 (1961). The existence of the symbiotic relationship may impose equal protection requirements upon the private nonprofit corporation,[2] but no decision of this Court remotely suggests that private corporations, as opposed to public bodies, are *a fortiori* subject to the strict scrutiny test.

In any event, the classification in question can be "rectified by the democratic process" since the state is free to impose whatever conditions it wishes upon its grant of financial aid, including conditions relating to the composition of the body which shall be the recipient of its bounty.

The decision of the Third Circuit is entirely consistent with the decisions of this Court and the other circuits. It determined that the strict scrutiny test was not applicable because the classification was not "suspect" and because no "fundamental right" to vote was present. *American Party*

---

[2] In the Third Circuit, respondents contended that the internal corporate matter of the selection of private members of the board did not involve "state action," although they conceded the existence of state action in all the business activities of Penn State. Respondents still maintain this position, but do not believe that this Court need consider this issue in determining whether to grant certiorari.

of Texas v. White, 415 U.S. 767 (1974). It then applied the rational basis test, as required by the decisions of this Court, [See *Holt Civil Club v. City of Tuscaloosa*, ___ U.S. ___ 99 S. Ct. 383 (1978)] and determined that the classification passed constitutional muster.

2. Petitioners contend that the decision of the Third Circuit conflicts with *Baker v. Regional High School District No. 5*, 520 F.2d 799, 801-802 (2d Cir. 1975), *cert. denied sub nom., Nonnewaug Regional School District v. Scott*, 424 U.S. 965 (1976) and with *Dundee v. Orleans Board of Parish Supervisors*, 434 F.2d 135, 139 (5th Cir. 1970). The conflict allegedly arises from the Third Circuit finding that respondents do not exercise governmental powers within the meaning of *Kramer* and its progeny.

Initially, it must be understood that respondents exercise no governmental powers in that they have no legal authority to perform legislative, administrative or judicial functions for the citizens of the Commonwealth or any political subdivision thereof. The impact of its activities are directly upon students, who may be non-residents of Pennsylvania, and who choose to purchase educational services. The amount of the educational subsidy provided by the Commonwealth of Pennsylvania is decided upon by the General Assembly, in its sole discretion, and not by the respondents. The petitioners do not seek the right to vote as citizens in a general election, but rather because they are students.

Thus, the decisions cited by petitioner are totally inapposite. In *Baker*, supra, the plaintiffs were residents, taxpayers and electors of municipalities in Connecticut who were seeking application of the one person – one vote principle to the election of school board members in regional school districts. The board of the regional school district

exercised considerable governmental powers in the region, although lacking the power to tax or issue bonds. These powers were: (1) all the powers and duties conferred upon boards of education; (2) the power to assume the capital indebtedness issued by towns; (3) to receive property from towns; (4) to build, add to or equip schools for the benefit of towns; (5) to issue bond anticipation notes and to treat the proceeds thereof as other school districts or municipalities; and (6) to propose to the general electorate for ratification the issuance of governmental obligations. The respondents simply do not possess any of these powers.

In *Dundee, supra,* the plaintiff was a citizen, taxpayer and resident of the City of New Orleans who sought application of one person - one vote principle in the election of the board of tax assessors for the city. This board fixed the tax assessment of all taxable property within the Parish of Orleans and the amount of ad valorem taxes for the City of New Orleans and the Orleans Parish School Board and other governmental agencies. The Fifth Circuit held that since the state had determined that these officials be elected by the general electorate, and because of the impact of their actions upon all the citizens of the political subdivision, the principle of one person - one vote had to apply.

Thus, there are three crucial distinctions between the court of appeal's decision in this case and *Baker, supra* and *Dundee, supra.* First, respondents do not exercise any of the governmental powers specified in these decisions. Second, in this case there is no election authorized by the state for the general electorate in a political subdivision. Third, plaintiffs do not seek the right to vote as members of the general electorate, but rather because of their status as students. In light of these distinctions, there is no conflict between the holdings in *Baker* and *Dundee* and the conclusions of the court of appeals in this case that the right to vote was not at issue.

3. Petitioners assert that even under the rational basis test, the selection process for trustees violates equal protection because the reasons for inclusion of agricultural and industrial trustees are based solely upon history. First, of course, the justification for permitting alumni and members of agricultural and industrial societies to participate in the selection process is not "historical accident." Although the rationale may be founded in the historical antecedents of the University, it is as cogent today as it was in 1867 when the University first accepted its continuing obligation to be an institution committed to teaching the agricultural and mechanic arts.

Moreover, petitioners seem to be making the argument that the corporate charter provisions which permit agricultural and industrial societies to select trustees are rational if students are also permitted to select trustees, but are irrational if students are not permitted to participate in the selection. Thus at page 14 of the petition they state:

> "While those reasons may sufficie to permit those with the franchise to continue to vote, they do not provide any rationale for denying students a comparable right."

This argument is necessarily predicated upon the assumption that the corporate charter of Penn State "grants the franchise" to the designated groups on the basis of the same rationale the petitioners advance in support of their "right to vote" for trustees; that is, the effect of the University's activities upon the particular class. Since students are more affected by its activities than are the members of the alumni, and the agricultural societies and industrial societies, presumably it is irrational to exclude the former while including the latter.

Of course, the corporate charter does not "grant the franchise" in any sense of that phrase. Nor does it authorize

persons to participate in the selection of trustees because such persons are "affected" by its activities. Rather, as the court of appeals' decision makes clear, it permits such persons to participate because their activities and interests as members of these groups are reasonably related to some of the major missions and goals of the institution. Petitioners cannot formulate their own rationale for the charter classifications and then proceed to demonstrate how this conjectural rationale requires the inclusion of the petitioners in the trustee selection process.

Even apart from petitioners' contention as to the rationale for the charter classifications, the mere fact that Penn State affects the lives of its students does not create a constitutional right to vote. As Justice Renquist noted in *Salyer Land Co. v. Tular Lake Water Basin Stor. Dist.*, 410 U.S. 719 (1973), at page 732:

> "Even though appellants derive no benefit from the *Reynolds* and *Kramer* lines of cases, they are, of course, entitled to have their equal protection claim assessed to determine whether the State's decision to deny the franchise to residents of the district while granting it to landowners was 'wholly irrelevant to achievement of the regulation's objections," Kotch v. Board of River Port Pilot Commissioners for Port of New Orleans, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093 (1947). No doubt residents within the district may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise 'affected' by the activities

> of the district. Constitutional adjudication cannot rest on any such 'house that Jack built' foundation, however."

Therefore, the exclusion of students, *qua students*, from participation in the selection process cannot make irrational an otherwise rational classification.

In any event, there are rational reasons why a university might choose to exclude students from participation in the selection of its board of trustees. For example, Penn State could rationally conclude that students might vote their own short term economic self interests, rather than the overall needs of the institution, in an inflationary era of rising tuition. Many other rational reasons could be cited.

THE DECISION OF THE THIRD CIRCUIT TURNS ON ITS OWN PARTICULAR FACTS AND IS NOT OF IMPORTANCE BEYOND THE INTERESTS OF THE LITIGANTS.

The relationship between The Pennsylvania State University and the Commonwealth of Pennsylvania is unique in the United States. So far as respondents are aware, no other state chose to designate a private nonprofit corporation as the Land Grant institution and, to protect the public interest, place a minority of public representatives on the board with the consent of the majority. Although this is a unique arrangement, it has proved wise because it has guaranteed the institution autonomy, within a framework of fiscal responsibility, and has insulated the institution from the political affairs of state government.

Consequently, the decision of the Third Circuit is based upon a unique set of facts not applicable to any other institution of higher education in the nation. The decision has

no effect as a direct precedent on any other potential litigants, particularly state universities and their students. It is not sufficiently important for this Court to grant the petition for writ of certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Delbert J. McQuaide
R. Mark Faulkner
McQUAIDE, BLASKO & BROWN, Inc.
811 University Drive
State College, Pennsylvania 16801

J. Thomas Menaker
McNEES, WALLACE & NURICK
100 Pine Street
P.O. Box 1166
Harrisburg, Pennsylvania 17108